No. 91-402

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

THE STATES OF ALABAMA, ARIZONA, DELAWARE, HAWAII, ILLINOIS, IOWA, KANSAS, LOUISIANA, MISSOURI, MONTANA, NEVADA, NEW HAMPSHIRE, OHIO, OKLAHOMA, RHODE ISLAND, SOUTH DAKOTA, UTAH AND WEST VIRGINIA, AND THE COMMONWEALTHS OF KENTUCKY AND PENNSYLVANIA,

Petitioners,

v.

CHARLES A. BOWSHER, in his official capacity as Comptroller General of the United States,

and

NICHOLAS F. BRADY, in his official capacity as Secretary of the Treasury of the United States,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

PETITION FOR A WRIT OF CERTIORARI

ANDREW P. MILLER
(Counsel of Record)
BERNARD NASH
PETER J. KADZIK
DAN SCHWEITZER
DICKSTEIN, SHAPIRO & MORIN
2101 L Street, N.W.
Washington, D.C. 20037
(202) 785-9700
Special Counsel for Petitioners

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

Petitioners are 20 States that are seeking custodial possession as conservators, on behalf of citizens of their States, of unclaimed monies held by the Secretary of the Treasury. The Secretary holds the monies in a fund created for the sole purpose of facilitating the disbursement of unclaimed monies to claimants. Although the statute pursuant to which the federal government holds the monies (31 U.S.C. § 1322) neither expressly preempts state unclaimed property statutes nor provides that the federal government permanently retain the monies that remain unclaimed, the court of appeals held that the Supremacy Clause bars the application of the state statutes. The questions presented are:

1. Whether 31 U.S.C. § 1322, lacking preemptive language, preempts state unclaimed property statutes even though such statutes dovetail with 31 U.S.C. § 1322.

2. Whether the property law relationships created by the state unclaimed property statutes should be incorporated into 31 U.S.C. § 1322, through the federal common law, when such incorporation would advance federal objectives.

PARTIES

Petitioners are 20 of the 23 States that were plaintiffs in the district court and appellants in the court of appeals. The three States that were parties below but are not petitioners herein are the States of Florida, Minnesota and Wisconsin. The States of Florida and Minnesota (along with Ohio, which has joined this Petition) filed briefs separate from those of the 19 other petitioner States in the proceedings below. The States of Florida and Minnesota will be filing a separate Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit. The State of Wisconsin was aligned below with petitioners and has not joined this Petition.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	2
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
A. The State Statutes	3
B. The Property At Issue	5
C. The Position Of Treasury	7
D. Proceedings Below	8
REASONS FOR GRANTING THE WRIT	10
I. THE COURT OF APPEALS' DECISION BARRING STATE CUSTODIAL CLAIMS, ON BEHALF OF THE RIGHTFUL OWNERS OF THE PROPERTY, FOR UNCLAIMED PROPERTY HELD BY THE SECRETARY OF THE TREASURY IS INCORRECT	11
A. The Court Of Appeals Erred In Deciding That The State Custodial Claims Are Preempted By 31 U.S.C. § 1322	11
B. The Court Of Appeals Erred In Deciding That The State Custodial Claims Are Barred By The Intergovernmental Immunity Doctrine	17
II. THIS CASE RAISES IMPORTANT ISSUES OF FEDERALISM AND THE APPLICATION OF FEDERAL COMMON LAW	23
CONCLUSION	25

TABLE OF CONTENTS—Continued

	Page
APPENDIX A	1a
APPENDIX B	8a
APPENDIX C	42a
APPENDIX D	43a
APPENDIX E	45a
APPENDIX F	50a
APPENDIX G	56a

TABLE OF AUTHORITIES

Cases: Page

Anderson Nat'l Bank v. *Luckett*, 321 U.S. 233 (1944) 9, 17, 18, 19, 21
Atascadero State Hospital v. *Scanlon*, 473 U.S. 234 (1985) 12
Braun v. *McPherson*, 277 Mich. 396, 269 N.W. 211 (1936) 19
Buchanan v. *Alexander*, 45 U.S. (4 How.) 20 (1846) 23
Burks v. *Lasker*, 441 U.S. 471 (1979) 19
Butner v. *United States*, 440 U.S. 48 (1979) 20
Connecticut Mut. Life Ins. Co. v. *Moore*, 333 U.S. 541 (1948) 4, 14, 20
De Sylva v. *Ballentine*, 351 U.S. 570 (1956) 19, 20
First Nat'l Bank v. *Anderson*, 269 U.S. 341 (1926) 21
Gregory v. *Ashcroft*, 111 S. Ct. 2395 (1991) .. 10, 11, 12, 24, 25
Hancock v. *Train*, 426 U.S. 167 (1976) 17, 19, 21, 25
Hodgson v. *Wheaton Glass Co.*, 446 F.2d 527 (3d Cir. 1971) 18
In re Moneys Deposited in and Now Under the Control of the United States District Court for the Western District of Pennsylvania, 243 F.2d 443 (3d Cir. 1957) 18
Kamen v. *Kemper Financial Services, Inc.*, 111 S. Ct. 1711 (1991) 19, 21, 24
Kentucky v. *Baker*, No. 87-CI-0525 (Cir. Ct. Ky.), *removed*, No. 87-43 (E.D. Ky. 1987) 7
Louisiana Pub. Serv. Comm'n v. *Federal Communications Comm'n*, 476 U.S. 355 (1986) 10, 12
Mathews v. *Eldridge*, 424 U.S. 319 (1976) 22
McCulloch v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819) 21
Morgan v. *Commissioner*, 309 U.S. 78 (1940) 20
North Dakota v. *United States*, 110 S. Ct. 1986 (1990) 17, 19
Pennsylvania v. *New York*, 407 U.S. 206 (1972) .. 5, 16
Provident Inst. for Savings v. *Malone*, 221 U.S. 660 (1911) 15

TABLE OF AUTHORITIES—Continued

	Page
Ray v. *Atlantic Richfield Co.*, 435 U.S. 151 (1978)	23
Reconstruction Finance Corp. v. *Beaver County*, 328 U.S. 204 (1946)	20
Rice v. *Santa Fe Elevator Corp.*, 331 U.S. 218 (1947)	12, 23
Roth v. *Delano*, 338 U.S. 226 (1949)	9, 17, 18, 19, 21
Schweiker v. *Hansen*, 450 U.S. 785 (1981)	16
Texas v. *New Jersey*, 379 U.S. 674 (1965)	5, 16
United States v. *Kimbell Foods, Inc.*, 440 U.S. 715 (1979)	19, 24
United States v. *Klein*, 303 U.S. 276 (1938)	15-19, 21, 22
United States v. *Klein*, 106 F.2d 213 (3d Cir.), *cert. denied*, 308 U.S. 618 (1939)	18
Will v. *Michigan Dep't of State Police*, 491 U.S. 58 (1989)	12
Yiatchos v. *Yiatchos*, 376 U.S. 306 (1964)	20
United States Constitution:	
Art. VI, cl. 2 (Supremacy Clause)	2, 8, 10, 25
Federal Statutes:	
5 U.S.C. § 8705(d)	13
19 U.S.C. § 1491	13
25 U.S.C. § 373b	13
26 U.S.C. § 6408	13
28 U.S.C. § 1254(1)	2
28 U.S.C. § 1331	8
28 U.S.C. § 2201	8
31 U.S.C. § 1321	2
31 U.S.C. § 1321(a)	5, 6
31 U.S.C. § 1321(b)	5
31 U.S.C. § 1322	*passim*
31 U.S.C. § 1322(a)	*passim*
31 U.S.C. § 1322(b)	6, 7, 13
31 U.S.C. § 1322(c)	7, 13
38 U.S.C. § 3202(e)	13
40 U.S.C. § 484(m)	13
48 U.S.C. § 1503	13
Permanent Appropriation Repeal Act of 1934, Pub. L. No. 473, 48 Stat. 1224 (1934)	13, 14, 18

TABLE OF AUTHORITIES—Continued

State Statutes: Page

Ala. Code §§ 35-12-20 to -48 (1975 & Supp. 1990) 3
Ala. Code § 35-12-21 (1975) 4
Ala. Code §§ 35-12-31, -33 (1975) 4
Ala. Code § 35-12-32 (1975) 4, 14
Ala. Code § 35-12-34 (1975) 4
Ariz. Rev. Stat. Ann. §§ 44-301 to -340 (1956 & Supp. 1990) 3
Del. Code Ann. tit. 12, §§ 1130-1212 (1987 & Supp. 1990) 3
Haw. Rev. Stat. §§ 523A-1 to -65 (1985 & Supp. 1990) 3
Ill. Ann. Stat. ch. 141, paras. 101-146 (Smith-Hurd 1986 & Supp. 1991) 3
Iowa Code Ann. §§ 556.1-.30 (West Supp. 1991) 3
Kan. Stat. Ann. §§ 58-3901 to -3933 (1983 & Supp. 1990) 3
Ky. Rev. Stat. Ann. §§ 393.010-.990 (Michie/Bobbs-Merrill 1984 & Supp. 1990) 3
La. Rev. Stat. Ann. §§ 9:151-:188 (West Supp. 1991) 3
Mich. Comp. Laws ch. 263, § 13476 (Mason's Supp. 1945) 19
Mo. Ann. Stat. §§ 447.500-.595 (Vernon 1986 & Supp. 1991) 3
Mont. Code Ann. §§ 70-9-101 to -502 (1989) 3
Nev. Rev. Stat. Ann. §§ 120A.110-.450 (Michie 1986 & Supp. 1989) 3
N.H. Rev. Stat. Ann. §§ 471-C:1 to :43 (Supp. 1990) 3
N.H. Rev. Stat. Ann. § 471-C:1 (Supp. 1990) 4
N.H. Rev. Stat. Ann. §§ 471-C:19, :21 (Supp. 1990) 4
N.H. Rev. Stat. Ann. § 471-C:20 (Supp. 1990) 4, 14
N.H. Rev. Stat. Ann. § 471-C:22 (Supp. 1990) 4
Ohio Rev. Code Ann. §§ 169.01-.99 (Anderson 1990 & Supp. 1990) 3
Okla. Stat. Ann. tit. 60, §§ 651-687 (West 1971 & Supp. 1991) 3

TABLE OF AUTHORITIES—Continued

	Page
72 Pa. Cons. Stat. Ann. §§ 1301.1-.29 (Purdon Supp. 1991)	3
R.I. Gen. Laws §§ 33-21.1-1 to .1-41 (Supp. 1990)	3
S.D. Codified Laws Ann. §§ 43-41A-1 to -52 (1983 & Supp. 1991)	3
Utah Code Ann. §§ 78-44-1 to -40 (1987 & Supp. 1991)	3
W. Va. Code §§ 36-8-1 to -31 (1985 & Supp. 1991)	3
1981 Uniform Unclaimed Property Act, 8A *Uniform Laws Annotated* 617 (1983)	2
1966 revision to 1954 Uniform Disposition of Unclaimed Property Act, 8A *Uniform Laws Annotated* 135 (1983)	2
Miscellaneous:	
78 Cong. Rec. H8244 (daily ed. May 7, 1934)	14
1 D. Epstein, A. McThenia & C. Forslund, *Unclaimed Property Law and Reporting Forms* (1991 & Supp. 1991)	15
P. Bator, D. Meltzer, P. Mishkin & D. Shapiro, *Hart and Wechsler's The Federal Courts and The Federal System* (3d ed. 1988)	11, 24
McThenia & Epstein, *Issues of Sovereignty in Escheat and the Uniform Unclaimed Property Act*, 40 Wash. & Lee L. Rev. 1429 (1983)	15
1 Treasury Financial Manual	
1-1010.10	7, 16
6-3030 to -3040	5
6-3030	5
6-3040.10	5, 7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No.

THE STATES OF ALABAMA, ARIZONA, DELAWARE, HAWAII, ILLINOIS, IOWA, KANSAS, LOUISIANA, MISSOURI, MONTANA, NEVADA, NEW HAMPSHIRE, OHIO, OKLAHOMA, RHODE ISLAND, SOUTH DAKOTA, UTAH AND WEST VIRGINIA, AND THE COMMONWEALTHS OF KENTUCKY AND PENNSYLVANIA,

Petitioners,

v.

CHARLES A. BOWSHER, in his official capacity as Comptroller General of the United States,

and

NICHOLAS F. BRADY, in his official capacity as Secretary of the Treasury of the United States,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

PETITION FOR A WRIT OF CERTIORARI

The above-captioned States respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals, reported at 935 F.2d 332, is reprinted in the Appendix ("App.") at 1a-7a; the opinion of the district court, reported at 734 F. Supp. 525, is reprinted at App. 8a-41a.

JURISDICTION

The judgment of the court of appeals was entered on June 11, 1991; this Court has jurisdiction to review that judgment under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case concerns whether the Supremacy Clause bars States from enforcing their unclaimed property statutes to take custodial possession of unclaimed monies owned by their citizens but held by the Secretary of the Treasury ("Secretary") pursuant to 31 U.S.C. § 1322(a). Article VI, clause 2 of the United States Constitution (the Supremacy Clause) and 31 U.S.C. § 1322 are set forth at App. 42a and App. 43a-44a, respectively. 31 U.S.C. § 1321, which lists and references the trust funds that are the source of the monies held by the Secretary pursuant to 31 U.S.C. § 1322, is set forth at App. 45a-49a.

To avoid unnecessary length and repetition, the relevant provisions of the unclaimed property statutes of Alabama and New Hampshire are set forth at App. 50a-55a and App. 56a-62a, respectively, as representative of the unclaimed property statutes of the petitioner States. Virtually all the petitioners have enacted versions of either the 1966 revision to the 1954 Uniform Disposition of Unclaimed Property Act, 8A *Uniform Laws Annotated* 135 (1983), or the 1981 Uniform Unclaimed Property Act, 8A *Uniform Laws Annotated* 617 (1983). Alabama's statute is representative of the former; New Hampshire's statute is representative of the latter.

STATEMENT OF THE CASE

At issue in this case is a basic question of federalism: the deference that state statutes should be accorded in our federal system. Pursuant to their unclaimed property statutes, the 20 petitioner States are seeking to recover, on behalf of their citizens, certain unclaimed intangible personal property that the Secretary of the Treasury, as head of the Department of the Treasury ("Treasury"), holds. The Secretary has refused to remit the unclaimed property at issue to the States, notwithstanding that the statute pursuant to which the Secretary holds the property authorizes claims upon the property and does not preclude States from making such claims.

A. The State Statutes

Each of the 20 petitioner States has enacted an unclaimed property statute that authorizes the State to take custodial possession of unclaimed intangible personal property that is held by persons or entities on behalf of the rightful owners of the property.[1] Under these statutes, property that has remained unclaimed for a speci-

---

[1] *See* Ala. Code §§ 35-12-20 to -48 (1975 & Supp. 1990); Ariz. Rev. Stat. Ann. §§ 44-301 to -340 (1956 & Supp. 1990); Del. Code Ann. tit. 12, §§ 1130-1212 (1987 & Supp. 1990); Haw. Rev. Stat. §§ 523A-1 to -65 (1985 & Supp. 1990); Ill. Ann. Stat. ch. 141, paras. 101-146 (Smith-Hurd 1986 & Supp. 1991); Iowa Code Ann. §§ 556.1-.30 (West Supp. 1991); Kan. Stat. Ann. §§ 58-3901 to -3933 (1983 & Supp. 1990); Ky. Rev. Stat. Ann. §§ 393.010-.990 (Michie/Bobbs-Merrill 1984 & Supp. 1990); La. Rev. Stat. Ann. §§ 9:151-:188 (West Supp. 1991); Mo. Ann. Stat. §§ 447.500-.595 (Vernon 1986 & Supp. 1991); Mont. Code Ann. §§ 70-9-101 to -502 (1989); Nev. Rev. Stat. Ann. §§ 120A.110-.450 (Michie 1986 & Supp. 1989); N.H. Rev. Stat. Ann. §§ 471-C:1 to :43 (Supp. 1990); Ohio Rev. Code Ann. §§ 169.01-.99 (Anderson 1990 & Supp. 1990); Okla. Stat. Ann. tit. 60, §§ 651-687 (West 1971 & Supp. 1991); 72 Pa. Cons. Stat. Ann. §§ 1301.1-.29 (Purdon Supp. 1991); R.I. Gen. Laws §§ 33-21.1-1 to .1-41 (Supp. 1990); S.D. Codified Laws Ann. §§ 43-41A-1 to -52 (1983 & Supp. 1991); Utah Code Ann. §§ 78-44-1 to -40 (1987 & Supp. 1991); W. Va. Code §§ 36-8-1 to -31 (1985 & Supp. 1991).

fied period of time is presumed abandoned. The custodian of presumptively abandoned property, including a governmental entity, is deemed to be a "holder" of the property and is required to report and remit the property to the State.[2] Once it transfers the property to the State, the holder is relieved of all liability to the missing owners but can, if it chooses, pay claimants nonetheless and then receive complete indemnification from the State.[3] After receiving the property, the State searches for the rightful owner of the property,[4] and pays it to such owner upon verification of claim. This Court has described the States' role under these statutes as that of a "conservator". *Connecticut Mut. Life Ins. Co.* v. *Moore*, 333 U.S. 541, 547 (1948).

The unclaimed property statutes that the States seek to enforce in this action are part and parcel of the States' long-established authority to regulate the succession of property. After the Revolutionary War, the States, rather than the federal government, assumed the Crown's right to unclaimed property and have retained that power ever since.[5] The States have exercised their police power

---

[2] The state unclaimed property statutes generally define a "holder" as any person who is in possession of property belonging to another, is a trustee, or is indebted to another on an obligation. The statutes' definition of "person" includes governmental or political subdivisions. *See, e.g.*, Ala. Code § 35-12-21 (1975); N.H. Rev. Stat. Ann. § 471-C:1 (Supp. 1990). Examples of the reporting and remitting requirements in the state statutes are Ala. Code §§ 35-12-31, -33 (1975) and N.H. Rev. Stat. Ann. §§ 471-C:19, :21 (Supp. 1990).

[3] *See, e.g.*, Ala. Code § 35-12-34 (1975); N.H. Rev. Stat. Ann. § 471-C:22 (Supp. 1990).

[4] *See, e.g.*, Ala. Code § 35-12-32 (1975); N.H. Rev. Stat. Ann. § 471-C:20 (Supp. 1990).

[5] *See Connecticut Mut. Life Ins. Co.*, 333 U.S. at 547 (the "right of appropriation by the state of abandoned property has existed for centuries in the common law").

over unclaimed property in a number of ways, ranging from traditional escheat statutes concerning property for which there is no known heir to the custodial statutes at issue in this action. Under this Court's precedents, a State is authorized to take custody of unclaimed intangible personal property owed to persons with last-known addresses in that State.[6]

B. The Property At Issue

The unclaimed property at issue is unclaimed monies held by the Secretary in a fund established pursuant to 31 U.S.C. § 1322(a). Section 1322(a) requires the Secretary to transfer "to the Treasury trust fund receipt account 'Unclaimed Moneys of Individuals Whose Whereabouts are Unknown' " unclaimed monies that have been held for more than one year in the first 82 trust funds listed in 31 U.S.C. § 1321(a) and in "analogous" trust funds referenced in 31 U.S.C. § 1321(b).[7] For accounting purposes, Treasury has established two accounts to hold the unclaimed monies, account 20X6133 and account 1060.[8] The Secretary maintains the two accounts and is,

---

[6] *Pennsylvania* v. *New York*, 407 U.S. 206 (1972); *Texas* v. *New Jersey*, 379 U.S. 674 (1965). For this reason, each State seeks custody only of the property held by the Secretary that is owed to individuals and entities with last-known addresses in that State.

[7] Despite petitioners' repeated requests, respondents have refused to identify the "analogous" trust funds.

[8] These two accounts are described by Treasury in 1 Treasury Financial Manual ("TFM") 6-3030 to -3040. Account 20X6133 serves as a depository for monies that meet the following criteria: "[1] Amount is $25.00 or more; [2] A refund, upon claim, would be absolutely justified; [3] There is no doubt as to legal ownership of the funds; and [4] A named individual, business, or other entity can be identified with the item." 1 TFM 6-3040.10. Account 1060 is a "miscellaneous receipts" account. It serves as a depository for monies in the amount of less than $25.00 and monies in the amount of $25.00 or more that do not meet all the criteria for inclusion in account 20X6133. 1 TFM 6-3030.

therefore, the "holder" of the unclaimed monies under the pertinent state statutes.

Section 1322(b) authorizes the Secretary to disburse the unclaimed monies to claimants. The statute grants the Secretary this disbursement power because the statute is not a federal escheat statute, *i.e.*, it does not authorize the Secretary to retain permanently the unclaimed monies in the two accounts. Of the first 82 trust funds listed in Section 1321(a), however, four have underlying legislation which specifies that unclaimed monies remain permanently with the federal government.[9] The underlying legislation of some of the "analogous" trust funds, once they have been identified, may also explicitly provide for permanent federal retention. The States do not seek custody of unclaimed monies derived from such funds. The States seek custody only of the unclaimed monies derived from the remaining funds whose underlying legislation does not provide for such monies' permanent federal retention.[10]

The Secretary's mere temporary interest in the property is set forth in Section 1322(a), which explicitly states that "[s]ubsequent claims to the transferred funds shall be paid from the account 'Unclaimed Moneys of Individuals Whose Whereabouts are Unknown.'" Treasury acknowledges its temporary interest and admits that monies held in account 20X6133 are "unequivocally refundable"; claims upon monies in that account are paid

---

[9] These funds are listed at 31 U.S.C. §§ 1321(a)(8), (42), (45) and (61).

[10] According to respondents, over $90 million was maintained in account 20X6133 as of April 30, 1989. Defendant Brady's Answers to Plaintiffs' First Set of Interrogatories at 12 (June 23, 1989). Respondents did not provide a useful cumulative figure for account 1060 because that account is "cleared" each year. *Id.* at 12-13. The record does not indicate the percentage of these monies that are governed by an underlying statute providing for permanent federal retention.

out directly from the account. 1 TFM 6-3040.10. Treasury acknowledges that claims upon monies in account 1060 are satisfied as well, although, for accounting reasons, the claims are paid out of a separate account (account 20X1807). *Id.*

C. The Position Of Treasury

Although the language of 31 U.S.C. § 1322(a) explicitly authorizes "claims" to be made upon the unclaimed fund and does not preclude States from filing custodial "claims" with the Secretary, Treasury consistently has refused to comply with State requests for custody of the property.[11] Treasury has not promulgated any regulations with respect to the Section 1322 monies, and thus has not provided the States (or any other interested entities) with the opportunity to comment on the implementation of 31 U.S.C. § 1322.[12] Treasury instead relies upon Volume 1 of the Treasury Financial Manual, a nonbinding manual designed for guidance to federal departments and agencies. *See* 1 TFM 1-1010.10. The manual specifies what forms agencies must fill out upon receiving claims by the "rightful" owners of specific property and states that the "sole purpose of" account 20X6133 is "to hold * * * moneys in trust for rightful owners." 1 TFM 6-3040.10.

Notwithstanding the absence of applicable procedures, several States sent letters to Treasury in February 1989,

---

[11] *See, e.g., Kentucky* v. *Baker*, No. 87-CI-0525 (Cir. Ct. Ky.), *removed*, No. 87-43 (E.D. Ky. 1987) (dismissed without prejudice) (Treasury opposed Commonwealth of Kentucky's efforts to take custody of unclaimed property held in Section 1322 trust fund that is owed to taxpayers with last-known addresses in the Commonwealth).

[12] 31 U.S.C. § 1322 contains a subsection that is not at issue in this case. Subsection (c) was enacted separately from subsections (a) and (b) and concerns unclaimed monies remaining from the final distribution of unclaimed Postal Savings System deposits. All references in this Petition to 31 U.S.C. § 1322, or "the Section 1322 fund (or monies)," refer solely to subsections (a) and (b).

requesting that the Director of the Cash Management Division of the Financial Management Service ("FMS") of the Department of the Treasury search her records and produce a list of unclaimed property in the custody of federal agencies belonging to residents of the respective States.[13] These requests were rejected on the ground that the FMS lacked the necessary information.[14]

D. Proceedings Below

Because (1) Congress has authorized claims to be made upon the Section 1322 funds, (2) that authorization does not preclude claims by States, (3) no federal regulations preclude claims by States, and (4) the United States Constitution does not authorize the federal government to escheat unclaimed property absent explicit legislative action, the States instituted this case to gain custodial possession of the unclaimed monies from the "holder" of such monies, the Secretary.

On March 30, 1990, the United States District Court for the District of Columbia granted respondents' Motion for Judgment on the Pleadings or, in the Alternative, for Summary Judgment.[15] The court held that the Supremacy Clause precludes the States from enforcing their un-

---

[13] *See* Defendants' Motion for Judgment on the Pleadings or, in the Alternative, for Summary Judgment (Oct. 1989), Exhibit B.

[14] *Id.*, Exhibit C. Certain States also sent a letter (on December 14, 1988) to the Comptroller General requesting, *inter alia*, an acknowledgment that the States have a valid claim to the unclaimed monies and a listing of any procedures that the States must complete to perfect their claims. This request, too, was rejected. *See* Third Amended Complaint, Exhibits A and B.

[15] The States sought, *inter alia*, a declaratory judgment that each State had a valid claim to the unclaimed monies and an injunction ordering the Secretary to disburse such monies to the States. The complaint also sought an injunction ordering the Comptroller General to settle the States' claims in their favor. The jurisdiction of the district court was based upon federal question jurisdiction, 28 U.S.C. § 1331, and the Declaratory Judgment Act, 28 U.S.C. § 2201.

claimed property statutes in the absence of a "clear congressional mandate" permitting the custodial taking of the monies in dispute.[16] App. 40a. The United States Court of Appeals for the District of Columbia Circuit affirmed that decision, holding that enforcement of the States' statutes would violate the intergovernmental immunity doctrine and is preempted by 31 U.S.C. § 1322. App. 4a-7a.

In the first prong of the court of appeals' decision, the court, without analyzing the varied sources of the monies at issue, deemed it all to be "federal money" and then concluded that "the states' plan would amount to direct regulation of federal property." App. 4a. Although the court conceded that "state substitution for the claimant" might be permissible in some instances, including when the State formally escheats unclaimed monies, it held that the distinction between escheat and custodial taking is of sufficient magnitude to warrant separate, and conflicting, rules. App. 6a. With respect to *Roth* v. *Delano*, 338 U.S. 226 (1949), and *Anderson Nat'l Bank* v. *Luckett*, 321 U.S. 233 (1944), in which this Court held that States could compel federal officers of national banks to comply with state custodial taking statutes, the court stated that the decisions could not be applied to other federal officers. App. 7a.

In the preemption prong of the court's decision, the court, without reference to the record, stated that "[t]ransferring the money from the Treasury to the states would surely make it less, not more, accessible to claimants * * *." The court then held that the state statutes would therefore "obstruct 'the accomplishment and execution of the full objectives of Congress.'" App.

---

[16] The court also held that the States failed to exhaust all applicable administrative remedies. On appeal, respondents did not contest the States' contention that they have, in fact, exhausted all applicable administrative remedies. For this reason, the court of appeals did not consider this issue. *See* App. 2a n.1.

5a-6a, quoting *Louisiana Pub. Serv. Comm'n* v. *Federal Communications Comm'n*, 476 U.S. 355, 368-69 (1986).

REASONS FOR GRANTING THE WRIT

This case concerns the extent to which federal courts will permit state statutes to play a meaningful role in our federal system. The Supreme Court recently reemphasized, in *Gregory* v. *Ashcroft*, 111 S. Ct. 2395 (1991), the many advantages of federalism and the reluctance with which the Supremacy Clause should be found to block the enforcement of state statutes, particularly in historic areas of state sovereignty. The court below ignored that tenet of judicial review and barred the application of the States' unclaimed property laws.

The language of 31 U.S.C. § 1322 nowhere provides that the statute preempts any state laws. Moreover, the States seek only that portion of the Section 1322 fund that is derived from sources whose underlying statutes likewise do not contain preemptive language. In light of this double silence on Congress' part with respect to the monies sought, the court below should not only have been extremely reluctant to find the state statutes barred by the Supremacy Clause but should have analyzed the relationship between the federal and state statutes with an eye toward accommodating them both. Instead the court engaged in a cursory discussion of the preemption doctrine and held that the statutes conflict. The court's intergovernmental immunity doctrine analysis displayed even more hostility to the role of state statutes, through its utilization of a "clear congressional mandate" standard of review that altogether ignores this Court's precedents that incorporate state laws into federal statutes as part of the federal common law.

The delicate balance between federal and state power is, of course, a continuing issue of critical concern to the vitality of our governmental structure. This balance has

been disturbed by the court of appeals' analysis and decision. The States' petition for a writ of certiorari is filed in order to seek recognition by this Court of the respect that should be accorded the state property laws in issue.

I. THE COURT OF APPEALS' DECISION BARRING STATE CUSTODIAL CLAIMS, ON BEHALF OF THE RIGHTFUL OWNERS OF THE PROPERTY, FOR UNCLAIMED PROPERTY HELD BY THE SECRETARY OF THE TREASURY IS INCORRECT

A. The Court Of Appeals Erred In Deciding That The State Custodial Claims Are Preempted By 31 U.S.C. § 1322

The court of appeals' willingness to find the property interests created by the state custodial taking statutes preempted by 31 U.S.C. § 1322 reflects a disregard for one of the fundamental premises of our federalist system, trenchantly summarized in *Hart and Wechsler's The Federal Courts and The Federal System* 533 (3d ed. 1988) ("*Hart and Wechsler's*"), as follows:

> Federal law is generally interstitial in its nature. It rarely occupies a legal field completely, totally excluding all participation by the legal systems of the states. * * * It builds upon legal relationships established by the states, altering or supplanting them only so far as necessary for the special purpose. Congress acts, in short, against the background of the total *corpus juris* of the states in much the way that a state legislature acts against the background of the common law, assumed to govern unless changed by legislation.

The Supreme Court has affirmed this principle by requiring that a federal statute clear numerous and substantial hurdles before being given preemptive effect. As the Court recently stated in *Gregory* v. *Ashcroft*, 111 S. Ct. at 2403, "inasmuch as this Court in *Garcia* [v. *San Antonio Metropolitan Transit Authority*, 469 U.S. 528

(1985)] has left primarily to the political process the protection of the States against intrusive exercises of Congress' Commerce Clause powers, we must be absolutely certain that Congress intended such an exercise."

This Court's longstanding concern that preemption should be found only reluctantly is reflected in the "plain statement" rule, which provides that "if Congress intends to alter the 'usual constitutional balance between the States and the Federal Government,' it must make its intention to do so 'unmistakably clear in the language of the statute.'" *Will* v. *Michigan Dep't of State Police*, 491 U.S. 58, 65 (1989), quoting *Atascadero State Hospital* v. *Scanlon*, 473 U.S. 234, 242 (1985). *See also Gregory*, 111 S. Ct. at 2401. This preserves "the assumption that the historic police powers of the States were not to be superseded by [a] Federal Act unless that was the clear and manifest purpose of Congress." *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

Respondents could not argue that Congress, in enacting 31 U.S.C. § 1322, expressed the intent to preempt state statutes or the intent that the Secretary retain permanent custody of monies that remain unclaimed. The language and legislative history of the statutes are silent on these points. The same is true of the legislation underlying the source of the funds the States here claim. Given this inability to pass the "plain statement" test, respondents resorted to the argument that Congress implicitly preempted the state laws. Due to its misreading of the nature of the federal statute at issue, and its failure to heed the policy concerns discussed in *Gregory*, the court below found such implicit preemption.

According to the court of appeals, the state unclaimed property statutes "obstruct 'the accomplishment and execution of the full objectives of Congress.'" App. 6a, quoting *Louisiana Pub. Serv. Comm'n*, 476 U.S. at 368-69. The court's only justification for this conclusion was

that "[t]ransferring the money from the Treasury to the states would surely make it less, not more, accessible to claimants, who presumably picture the federal government as the relevant payor." App. 5a-6a. Respondents themselves did not make this argument, presumably because they recognized that the record does not support it.

Petitioners agree with the court below that Congress enacted 31 U.S.C. § 1322 in order to make certain unclaimed monies more accessible to claimants. The court erred, however, because it gave short shrift to the function and structure of the state custodial taking statutes. Proper preemption analysis requires that ambiguous federal statutes presumptively be read to permit the continuing application of state laws.[17] This the court of appeals failed to do.

A review of the language and purpose of 31 U.S.C. § 1322 and state unclaimed property laws demonstrates that these statutes do not conflict. Congress enacted Section 1322 as part of the Permanent Appropriation Repeal Act of 1934, Pub. L. No. 473, 48 Stat. 1224, 1233 (1934) ("Act"). The Act eliminated the traditional system of permanent congressional appropriations of funds and replaced it with a procedure for annual appropriations. Among the various permanent appropriations repealed by the Act were appropriations for the payment

---

[17] In contrast to 31 U.S.C. § 1322(a) and (b) are the many federal statutes, such as 31 U.S.C. § 1322(c), that explicitly preempt state unclaimed property laws. *See, e.g.*, 5 U.S.C. § 8705(d) (federal group life insurance and group accidental death insurance benefits); 19 U.S.C. § 1491 (unclaimed merchandise; forfeited distilled spirits, wines and malt liquor); 25 U.S.C. § 373b (restricted estate or homestead on the public domain owned by an Indian found to have died intestate without heirs); 26 U.S.C. § 6408 (federal tax refunds); 38 U.S.C. § 3202(e) (Veterans' Administration payments); 40 U.S.C. § 484(m) (abandoned or unclaimed property on premises owned or leased by the federal government); 48 U.S.C. § 1503 (federal escheat of real property improperly held by aliens).

of unclaimed monies of individuals whose whereabouts were unknown. In lieu thereof, Congress established the segregated United States Treasury receipts account at issue.

As the court of appeals observed, the Act established no more than a "time-saving bookkeeping device." App. 5a, citing 78 Cong. Rec. H8244 (daily ed. May 7, 1934) (statement of Rep. Griffin). Section 1322 merely directs the Secretary to make certain accounting entries in order to serve the objective of facilitating the ultimate transfer of the unclaimed monies out of the federal government's hands. *Id.* That objective would only be furthered if state unclaimed property statutes were permitted to apply.

State custodial taking statutes, like state escheat statutes, establish property relationships and entitlements. Whereas escheat statutes authorize State ownership of unclaimed property, custodial taking statutes authorize States to be "conservators" of the property on behalf of the missing owners. *See Connecticut Mut. Life Ins. Co.*, 333 U.S. at 547. That state-law created relationship to the property and the missing owners not only does not conflict with the objectives of 31 U.S.C. § 1322, it supplements that section's purpose. State custodial taking statutes should not, therefore, be considered preempted.

To fulfill the States' role as "conservators," state unclaimed property statutes set up a comprehensive framework with respect to the receipt from "holders" of relevant information and unclaimed monies, as well as efforts to notify the rightful owners. These statutes require that the States publish the names of missing owners and mail notices to owners for whom the Unclaimed Property Administrator has a mailing address.[18] In addition to these search requirements, many States take

---

[18] *See, e.g.*, Ala. Code § 35-12-32 (1975); N.H. Rev. Stat. Ann. § 471-C:20 (Supp. 1990).

further actions to track down missing owners.[19] States are often very successful at locating the true owners of unclaimed property.[20]

By contrast, 31 U.S.C. § 1322 does no more than establish an account that makes the Secretary the holder of certain unclaimed monies. The record does not reflect that the federal government endeavors to search for the missing owners by the time the States would be entitled to custody of the property under their statutes.[21] Moreover, the contention that the federal government is an accessible central repository for the monies is belied by the fact that Treasury allegedly lacks the information necessary to assist claimants. A claimant would have to weave his, her or its way through the federal bureaucracy to determine to whom to direct a claim. In summary, permitting property interests created by state custodial taking statutes to apply would increase the likelihood that true owners of the property will be identified and actually submit claims.

This conclusion is bolstered by the fact that custodial taking statutes virtually have taken the place of, and serve the same function as, escheat statutes, which the court below acknowledged are not preempted by 31 U.S.C. § 1322. App. 6a. *See also United States* v. *Klein*, 303 U.S. 276 (1938) (State may escheat unclaimed property held in the fund at issue). Custodial taking statutes have existed for many years, *see, e.g., Provident Inst. for Savings* v. *Malone*, 221 U.S. 660 (1911), and, since the

---

[19] *See, e.g.*, 1 D. Epstein, A. McThenia & C. Forslund, *Unclaimed Property Law and Reporting Forms* § 5.11[2] at 5-41 & n.3 (1991 & Supp. 1991).

[20] McThenia & Epstein, *Issues of Sovereignty in Escheat and the Uniform Unclaimed Property Act*, 40 Wash. & Lee L. Rev. 1429, 1432 (1983).

[21] The dormancy period (*i.e.*, the period of time that property must be unclaimed to be deemed abandoned) established by most state statutes is five or seven years.

Supreme Court's 1938 decision in *Klein*, have replaced most escheat statutes. The distinguishing feature of custodial taking statutes is that they permit the missing owners to assert subsequent claims to the property. By holding that the States are precluded from recovering the unclaimed monies at issue under their custodial taking statutes, but not from escheating them, the court below in essence punishes the States for utilizing a procedure whereby the true owners may forever recover their property. It would be far more logical to treat custodial taking and escheat identically for the purpose of interpreting the impact of 31 U.S.C. § 1322.[22]

Finally, the procedures and statements contained in Volume 1 of the Treasury Financial Manual cannot be construed as having any preemptive effect. The procedures in the manual specify what forms agencies that transfer monies to the Section 1322 fund must complete upon receiving a claim. They do not, in any manner, address the array of issues covered by the state statutes. In any event, the manual merely provides instructions to assist federal departments and agencies in various fiscal and accounting matters. 1 TFM 1-1010.10. It is axiomatic that internal handbooks designed for use only by agency employees are not regulations and do not have the force of law. *See Schweiker* v. *Hansen*, 450 U.S. 785, 789 (1981).

The court of appeals, therefore, was wrong in concluding that 31 U.S.C. § 1322 preempts state unclaimed property statutes; the court failed to recognize that, since the federal and state statutes here in issue can be construed

---

[22] This Court has treated custodial taking and escheat identically in other settings; thus, the decrees the Court entered to effectuate its decisions in *Pennsylvania* v. *New York*, 407 U.S. 206 (1972), and *Texas* v. *New Jersey*, 379 U.S. 674 (1965), equated the two types of statutes.

to dovetail with each other, considerations of federalism dictate that they be so construed.

B. The Court Of Appeals Erred In Deciding That The State Custodial Claims Are Barred By The Intergovernmental Immunity Doctrine

The hostility exhibited by the court of appeals to state law can be seen not only in the court's faulty preemption analysis, but also in its misuse of the intergovernmental immunity doctrine. In analyzing whether the States' claims for custody of property held by a federal officer should be permitted, the court below relied exclusively upon cases such as *Hancock* v. *Train*, 426 U.S. 167, 178-80 (1976), and *North Dakota* v. *United States*, 110 S. Ct. 1986, 1995 (1990), which provide that States may not "directly regulate" the federal government absent a clear congressional mandate. The court's reflexive use of that standard in this case failed to account for the fact that courts frequently must, in applying the federal common law, incorporate state law into federal statutory schemes. Only by recognizing that principle of jurisprudence can the *Hancock* standard be reconciled with several Supreme Court decisions that compelled federal officers to comply with state unclaimed property statutes even though congressional authorization was ambiguous. The States in those cases were not "regulating" the federal government. Rather, the state laws meshed with the federal statutory scheme.

The cases upon which the States primarily relied in bringing this action were *United States* v. *Klein*, *Roth* v. *Delano* and *Anderson Nat'l Bank* v. *Luckett*. Although the Supreme Court did not use federal common law terminology in these cases, the Court's use of state unclaimed property laws illustrates the interstitial nature of federal statutory schemes. In *United States* v. *Klein*, this Court was called upon to decide whether the Commonwealth of Pennsylvania could escheat unclaimed property paid into the registry of a federal court and then transferred to

the Section 1322 fund.[23] The United States resisted, arguing "that the decree declaring the escheat is an unconstitutional interference with a court of the United States [and] an invasion of its sovereignty." 303 U.S. at 280. Notwithstanding the United States' objection, and the absence of any reference to state statutes in the federal statute, the Court held that Pennsylvania could escheat the monies (assuming the state court that declared the escheat had jurisdiction over them).[24] *Id.* at 281-82.

Roth v. *Delano* and *Anderson Nat'l Bank* v. *Luckett* concerned whether States could obtain custodial possession of (rather than title to) unclaimed monies held by federal entities, specifically, national banks. In neither instance did the federal statute that authorized the initial federal possession of the property also mandate that the property be turned over to States pursuant to state custodial taking statutes. Moreover, in both cases the federal entity resisted the impact of the state statute upon its operations. This Court nonetheless held that the federal officers could be compelled to comply with state custodial taking statutes. Its rationale was most forcefully articulated in *Roth*, where the Court stated that

---

[23] At that time, the statutory provision authorizing the establishment of the unclaimed property fund at issue was Section 17 of the Permanent Appropriation Repeal Act. Section 17 was codified as 31 U.S.C. § 725p, which was later recodified as 31 U.S.C. § 1322(a).

[24] In *United States* v. *Klein*, 106 F.2d 213 (3d Cir.), *cert. denied*, 308 U.S. 618 (1939), the Third Circuit held that the state court did in fact have jurisdiction to declare the escheat. Lower courts in subsequent cases also have refused to find that state escheat statutes impermissibly interfere with the federal government's possession of unclaimed property. *E.g.*, *Hodgson* v. *Wheaton Glass Co.*, 446 F.2d 527, 535 (3d Cir. 1971) (unclaimed payments of back wages ordered pursuant to the Fair Labor Standards Act); *In re Moneys Deposited in and Now Under the Control of the United States District Court for the Western District of Pennsylvania*, 243 F.2d 443, 445 (3d Cir. 1957) (unclaimed dividends in bankruptcy proceeding).

> [it] would not seem too much to ask that a federal officer, possessed of property claimed by the State to be subject to its taxing or escheat power, make reasonable disclosure thereof to such authority as the State designates. It is but a decent comity between governments. [338 U.S. at 230.] [25]

Klein, *Roth* and *Anderson Nat'l Bank* can be reconciled with *Hancock* and *North Dakota* in a manner that comports with the objectives of federalism once it is recognized that state laws frequently fill the interstices of federal statutes through the federal common law. This Court recently reaffirmed this interaction in *Kamen* v. *Kemper Financial Services, Inc.*, 111 S. Ct. 1711, 1717 (1991), stating that "federal courts should 'incorporat[e] [state law] as the federal rule of decision,' unless 'application of [the particular] state law [in question] would frustrate specific objectives of the federal programs,'" quoting *United States* v. *Kimbell Foods, Inc.*, 440 U.S. 715, 728 (1979) (brackets in original). Indeed, the Court has frequently incorporated various types of state laws into federal statutes. *See, e.g., Burks* v. *Lasker*, 441 U.S. 471, 478 (1979) (corporate law); *United States* v. *Kimbell Foods, Inc.*, 440 U.S. 715, 728 (1979) (commercial law); *De Sylva* v. *Ballentine*, 351 U.S. 570, 580-81 (1956) (family and property law).

Of particular importance here, this Court has in numerous instances allowed state property laws to define

---

[25] Although the Court in *Roth* used the term "escheat", that term was used in its most general sense. The Michigan statute at issue in *Roth* was, like the state statutes at issue in the instant case, a custodial taking statute. Mich. Comp. Laws ch. 263, as amended by Act 170, § 13476 (Mason's Supp. 1945). *See also Braun* v. *McPherson*, 277 Mich. 396, 269 N.W. 211, 213 (1936) (Under Michigan's statute, "the state takes possession of the property or the proceeds thereof in the capacity of a conservator for the benefit of any person lawfully entitled to it."). While the court of appeals recognized that *Anderson Nat'l Bank* involved a custodial statute, it does not appear to have recognized that the same was true in *Roth*. *See* App. 7a.

property interests under federal statutes. In *Butner* v. *United States*, 440 U.S. 48, 55 (1979), for example, the Court recognized that "[p]roperty interests are created and defined by state law," and held, therefore, that state laws define property interests for purposes of interpreting and implementing the federal bankruptcy code. In *De Sylva* v. *Ballentine*, 351 U.S. at 580-81, the Court held that state law determines whether illegitimate children are entitled to renew their parent's copyright under the federal copyright law. According to the Court, "[t]his is really a question of the descent of property, and we think the controlling question under state law should be whether the child would be an heir of the author." *Id.* at 582. *See also Yiatchos* v. *Yiatchos*, 376 U.S. 306, 309 (1964) (state law defines property interests of purchaser of federal bonds); *Reconstruction Finance Corp.* v. *Beaver County*, 328 U.S. 204, 210 (1946) (state law definition of "real property" controls operation of federal statute that permits only "real property" of federal agencies to be taxed by States); *Morgan* v. *Commissioner*, 309 U.S. 78, 80 (1940) (state law defines property interests subject to federal tax code).

The issue in this case thus devolves essentially to a question of federal common law, namely, whether state custodial taking laws should fill the interstices of 31 U.S.C. § 1322. The court of appeals acknowledged that "[a]s to some of the trust funds, escheat of the claimant's right might well substitute the state for the claimant and entitle it to payment." App. 6a. In other words, state law determines the identity of the successor to the missing owners, *i.e.*, the State, and this successor may claim Section 1322 monies. As discussed above, *see supra* at 4, 14, in *Connecticut Mut. Life Ins. Co.*, 333 U.S. at 547, this Court has recognized that States act as "conservators" when they take custody of unclaimed property on behalf of the missing owners of the property. The question presented, then, is whether the state law

determination, not of "successor", but of "conservator", is similarly respected, and incorporated, by the federal statute.

In acknowledging the probable validity of state escheat claims, the court below conceded, without admitting it, that the *Hancock* "clear congressional mandate" standard does not control whether the Secretary must remit to the States, as petitioners contend, custody of monies in the Section 1322 fund. Instead the issue is whether the incorporation of state custodial taking laws "frustrate[s] specific objectives" of 31 U.S.C. § 1322.[26] *Kamen*, 111 S. Ct. at 1717. These States submit that incorporation would further, not frustrate, such objectives.

---

[26] For this reason, the court below's attempt to distinguish *Klein* as an escheat case is beside the point. It is true, of course, that escheat and custodial taking are not identical concepts. The lesson of *Klein*, however, is that the standard courts should utilize in determining the validity of the state law-based property claims to the Section 1322 monies is whether such claims interfere with the federal objectives, not whether Congress unambiguously authorized them. (As discussed *infra* at 22, the similarity between escheat and custodial taking statutes supports the incorporation of custodial taking statutes into 31 U.S.C. § 1322, just as escheat statutes have been so incorporated.)

Even were *Roth* and *Anderson Nat'l Bank* limited, as suggested by the court below, to national banks (as compared to other federal agencies), the approach followed by the Court in those cases would be instructive. *Roth* and *Anderson Nat'l Bank* are clear-cut examples of decisions allowing state property laws to define property interests under a federal statutory scheme. In any event, there is no reason why a holding that requires an officer of a national bank in possession of unclaimed property to comply with state unclaimed property laws should not equally apply to other federal officers in possession of unclaimed property. *See First Nat'l Bank* v. *Anderson*, 269 U.S. 341, 347 (1926) (national banks are "agencies of the United States"); *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819) (the federal entity that the Court protected from a discriminatory state law was a national bank).

This Petition discusses at length above, *supra* at 13-15, the reasons why allowing the States to recover the unclaimed monies at issue would further the objectives of 31 U.S.C. § 1322, *i.e.*, to reunite the missing owners with their monies. Due to the comprehensive nature of the States' unclaimed property statutes, and the experience of State Unclaimed Property Administrators in tracking down such owners, remission of Section 1322 monies to the States as "conservators" would only increase the likelihood of their recovery by the missing owners. Thus, the court of appeals' decision ignored the demonstrated efficacy of the state statutes in issue.

Because the application of state custodial taking laws would further the objective of 31 U.S.C. § 1322, Section 1322 should incorporate the property law relationships among the States, the unclaimed property and the missing owners that are established by such statutes. As was true in the preemption analysis, *see supra* at 15-16, this conclusion is bolstered by the similarity between custodial taking laws and escheat laws. The latter were readily incorporated by this Court in *Klein* into 31 U.S.C. § 1322.

The court below clearly misconstrued the nature of 31 U.S.C. § 1322 when it concluded that the States are attempting to "directly regulate" the federal government because "[t]he money here is federal money." App. 3a-4a. Whatever interest the federal government has in the monies is a limited one that is subject to claims by persons or entities with a superior interest.[27] The issue here is whether the States' custodial claims, derived from state law-based property relationships, should be among

---

[27] The court below's assertion that the missing owners do not have "a property interest in the money" (App. 4a) reflects an outdated conception of property rights; in light of *Mathews* v. *Eldridge*, 424 U.S. 319, 332 (1976), and similar cases recognizing property interests in government entitlements, it is untenable to contend that the missing owners have no property interest in the Section 1322 fund.

the claims so recognized.[28] For the reasons set forth above, the answer is in the affirmative.

II. THIS CASE RAISES IMPORTANT ISSUES OF FEDERALISM AND THE APPLICATION OF FEDERAL COMMON LAW

This case involves more than a determination as to whether a particular federal statute, 31 U.S.C. § 1322, bars the application of the unclaimed property laws of these 20 States. At issue is the extent to which courts should view state laws as providing the background upon which federal statutes operate, thereby ensuring the continued vitality of state-based rights in our governmental structure. This Court has clearly held that where a federal statute does not contain any language or legislative history that indicates an intent to preempt state laws, the statute presumptively does not preempt state laws. *See Rice*, 331 U.S. at 230, *quoted in Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151, 157 (1978). The decision of the court of appeals calls into question that jurisprudential principle.

The reasoning of the court below is flawed in two fundamental ways that, if not corrected, will create considerable confusion in this area of the law. First, the review engaged in by the court to determine whether 31 U.S.C. § 1322 preempts the state unclaimed property laws was improperly focused. Lacking preemptive language, 31 U.S.C. § 1322 presumptively does not preempt

---

[28] The practical concerns that presumably motivated the Court in *Buchanan* v. *Alexander*, 45 U.S. (4 How.) 20 (1846), to hold that monies in the hands of a federal disbursing agent could not be garnished by a third party are not present here. The United States obviously has an interest in not being placed in the middle of disputes between recipients of federal monies and third parties. The instant action does not implicate that concern. The States are asserting their claims under the express terms of a federal statute that permits claims to be made upon the Section 1322 fund.

the state custodial taking laws. To fulfill the purpose behind that presumption, the court below should have attempted to reconcile the federal and state statutes. The court did not do so, instead holding that the state laws are preempted without even analyzing the function of such laws. Clearly, a further pronouncement by this Court is required to the effect that, in the absence of explicit preemptive language, federal statutes preempt state laws only where that is absolutely necessary to prevent frustration of "specific objectives" of the federal scheme. *Kamen*, 111 S. Ct. at 1717.

Second, the court altogether ignored the concept of incorporating state statutes into federal statutes through the federal common law, thereby calling into question the extent to which federal law "builds upon legal relationships established by the states." *Hart and Wechsler's* at 533. In *Kamen* v. *Kemper Financial Services, Inc.*, this Court reiterated that state laws presumptively fill the interstices of federal schemes. State laws do not fill such interstices

> *only* when the scheme in question evidences a distinct need for nationwide legal standards * * * [,] when express provisions in analogous statutory schemes embody congressional policy choices readily applicable to the matter at hand * * * [or] "application of [the particular] state law [in question] would frustrate specific objectives of the federal programs." [111 S. Ct. at 1717, quoting *Kimbell Foods, Inc.*, 440 U.S. at 728 (emphasis added).]

Absent such circumstances, which are not present here, the presumption applies.

This presumption in favor of applying state laws reflects the considerations discussed in *Gregory* v. *Ashcroft*, 111 S. Ct. at 2399, in which this Court described the "numerous advantages" that the "federalist structure of joint sovereigns preserves to the people." As the Court stated, federalism

> assures a decentralized government that will be more sensitive to the diverse needs of a heterogeneous society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry. [*Id.*]

In that case, this Court held that these factors militated against using the Supremacy Clause to bar the enforcement of state statutes unless that result were unequivocally required. *Id.* at 2401, 2403. Indeed, these factors militate in favor of incorporating state law to the extent that such incorporation does not conflict with federal policy. The court of appeals' *sub silencio* holding that the "clear congressional mandate" standard of *Hancock* trumps the practice of incorporating state law into federal statutes through application of federal common law lacks any foundation in precedent.

CONCLUSION

For the foregoing reasons, this Writ should be granted to provide the Court with the opportunity to reaffirm the vitality of state laws in areas in which the federal government may have legislated but without any "plain statement" of preemptive intent and where the state statutes at issue can fill the interstices of federal law.

Respectfully submitted,

ANDREW P. MILLER
(Counsel of Record)
BERNARD NASH
PETER J. KADZIK
DAN SCHWEITZER
DICKSTEIN, SHAPIRO & MORIN
2101 L Street, N.W.
Washington, D.C. 20037
(202) 785-9700
Special Counsel for Petitioners

HONORABLE JIMMY EVANS
Attorney General of Alabama
State House
11 South Union Street
Montgomery, Alabama 36130
205/242-7300

HONORABLE GRANT WOODS
Attorney General of Arizona
1275 West Washington
Phoenix, Arizona 85007
602/542-4266

HONORABLE CHARLES M. OBERLY, III
Attorney General of Delaware
820 North French Street
8th Floor
Wilmington, Delaware 19801
302/577-3838

HONORABLE WARREN PRICE, III
Attorney General of Hawaii
425 Queen Street
Honolulu, Hawaii 96813
808/586-1282

HONORABLE ROLAND W. BURRIS
Attorney General of Illinois
100 West Randolph Street
12th Floor
Chicago, Illinois 60601
312/814-2503

HONORABLE BONNIE CAMPBELL
Attorney General of Iowa
Hoover Building, 2nd Floor
1300 East Walnut Street
Des Moines, Iowa 50319
515/281-5164

HONORABLE ROBERT T. STEPHAN
Attorney General of Kansas
Judicial Center, 2nd Floor
Topeka, Kansas 66612
913/296-2215

HONORABLE FREDERIC J. COWAN
Attorney General of Kentucky
State Capitol, Room 116
Frankfort, Kentucky 40601
502/564-7600

HONORABLE WILLIAM J. GUSTE, JR.
Attorney General of Louisiana
2-3-4 Loyola Building
7th Floor
New Orleans, Louisiana 70112
504/568-5575

HONORABLE WILLIAM L. WEBSTER
Attorney General of Missouri
Supreme Court Building
211 W. High Street
Jefferson City, Missouri 65101
314/751-3321

HONORABLE MARC RACICOT
Attorney General of Montana
Justice Building
215 North Sanders
Helena, Montana 59620
406/444-2026

HON. FRANKIE SUE DEL PAPA
Attorney General of Nevada
Heroes Memorial Building
Capitol Complex
Carson City, Nevada 89710
702/687-4170

HONORABLE JOHN P. ARNOLD
Attorney General of
New Hampshire
25 Capitol Street
Concord, New Hampshire 03301
603/271-3658

HONORABLE LEE FISHER
Attorney General of Ohio
State Office Tower
30 East Broad Street
Columbus, Ohio 43266
614/466-3376

HONORABLE SUSAN B. LOVING
Attorney General of Oklahoma
112 State Capitol
Oklahoma City, Oklahoma 73105
405/521-3921

HON. ERNEST D. PREATE, JR.
Attorney General of
Pennsylvania
1435 Strawberry Square
16th Floor
Harrisburg, Pennsylvania 17120
717/787-3391

HONORABLE JAMES E. O'NEIL
Attorney General of Rhode Island
72 Pine Street
Providence, Rhode Island 02903
401/274-4400

HONORABLE MARK BARNETT
Attorney General of
South Dakota
500 E. Capitol
Pierre, South Dakota 57501
605/773-3215

HONORABLE R. PAUL VAN DAM
Attorney General of Utah
236 State Capitol
Salt Lake City, Utah 84114
801/538-1015

HONORABLE MARIO PALUMBO
Attorney General of
West Virginia
State Capitol, 26 East
Charleston, West Virginia 25305
304/348-2021

Dated: September 9, 1991

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

Nos. 90-5184, 90-5223

STATE OF ARIZONA, *et al.*,
Appellants,

v.

CHARLES A. BOWSHER, in his Official Capacity as Comptroller General of the United States, *et al.*

STATE OF ARIZONA, THE STATES OF MINNESOTA, OHIO and FLORIDA,
Appellants,

v.

CHARLES A. BOWSHER, in his Official Capacity as Comptroller General of the United States, *et al.*

Appeal from the United States District Court
for the District of Columbia

Argued March 8, 1991

Decided June 11, 1991

As Amended June 11, 1991

Andrew P. Miller, with whom Bernard Nash, Peter J. Kadzik and Frank F. Flegal were on the brief, for appellants State of Ariz., et al. in No. 90-5184.

Joe A. Walters, with whom Donald S. Arbour and E. William Crotty were on the brief, for appellants States of Minn., Ohio and Fla. in No. 90-5223.

Deborah Ruth Kant, Attorney, Dept. of Justice, with whom Stuart M. Gerson, Asst. Atty. Gen., Jay B. Stephens, U.S. Atty. and Barbara C. Biddle, Atty., Dept. of Justice, were on the brief, for appellees in Nos. 90-5184 and 90-5223.

Before EDWARDS, WILLIAMS and RANDOLPH, Circuit Judges.

Opinion for the Court filed by Circuit Judge STEPHEN F. WILLIAMS.

STEPHEN F. WILLIAMS, Circuit Judge:

By statute, the United States Department of the Treasury exercises custody over funds "represent[ing]" money that federal agencies owe to American citizens whose whereabouts are unknown. Twenty-three states claim a right to assume custody over these funds pursuant to their custodial taking laws. The district court held that the Supremacy Clause, art. VI, cl. 2, bars the states' claim. See *Alabama v. Bowsher*, 734 F.Supp. 525 (D.D.C.1990).[1] We agree.

* * * *

31 U.S.C. § 1322 requires the Secretary of the Treasury to

> transfer to the Treasury trust fund receipt account 'Unclaimed Moneys of Individuals Whose Whereabouts are Unknown' that part of the balance of a

[1] The district court also ruled that the states had failed to exhaust the applicable administrative remedies. As the government does not press this issue on appeal, we do not consider it.

> trust fund account named in section 1321(a)(1)-(82) of this title or an analogous trust fund established under section 1321(b) of this title that has been in the fund for more than one year and represents money belonging to individuals whose whereabouts are unknown. Subsequent claims to the transferred funds shall be paid from [this account].

Section 1321, in turn, sets up trust funds for such diverse sources of federal debt as funds of federal prisoners (§ 1321(a)(21)), pay of the Navy (§ 1321(a)(23)), certain unclaimed condemnation awards (§ 1321(a)(53)), and miscellaneous trust funds of Indian tribes (§ 1321(a)(67)). To fulfill its statutory duty, the Treasury has set up two holding accounts, "account 20X6133" and "account 1060", from which (as a general matter) it disburses money to claimants after the owing agency authorizes the payment. See generally 31 U.S.C. §§ 3325, 3528; I Treasury Financial Manual 6-3000 ff.

Acting under their unclaimed property statutes, see, e.g., Ariz.Rev.Stat.Ann. §§ 44-301 to -340 (1956 & Supp. 1990), twenty-three states assert a right to custody of the money that the Treasury currently holds to pay federal debts to citizens of those states. The states claim no escheat; they seek only temporary custody over the money until the rightful owners appear with valid claims. (In truth, of course, many of the rightful owners will never show up.)

Under the intergovernmental immunity component of Supremacy Clause jurisprudence, the states may not directly regulate the federal government's operations or property. See *Hancock v. Train*, 426 U.S. 167, 178-80, 96 S.Ct. 2006, 2012-13, 48 L.Ed.2d 555 (1976); see also *North Dakota v. United States*, —— U.S. ——, 110 S.Ct. 1986, 1995, 109 L.Ed.2d 420 (1990) (plurality op.); *id.* 110 S.Ct. at 2003-07 (opinion of Brennan, J.); *McCulloch v. Maryland*, 4 Wheat. 316, 4 L.Ed. 579 (1819). Indeed, the Constitution itself specifies that Congress retains the

"[p]ower to dispose of and make all needful Rules and Regulations respecting the . . . Property belonging to the United States. . . ." U.S. Const., art. IV, § 3, cl. 2. The issues before us, then, are whether the federal government has a property interest in the relevant accounts, and, if so, whether the states' claims here are attempts to regulate that interest.

When the United States sets aside money for the payment of specific debts, it does not thereby lose its property interest in that money. Thus, in *Buchanan v. Alexander*, 45 U.S. (4 How.) 20, 20-21, 11 L.Ed. 857 (1846), the Supreme Court prohibited creditors from garnishing money held by the purser of the frigate Constitution to pay its seamen's wages, reasoning that "[s]o long as money remains in the hands of a disbursing officer, it is as much the money of the United States, as if it had not been drawn from the treasury." See also *In re Joliet-Will County Community Action Agency*, 847 F.2d 430, 432-33 (7th Cir.1988) (reaffirming *Buchanan*'s authority and applying it to federal funds held by a federal grantee as trustee to carry out the grant); *Palmiter v. Action, Inc.*, 733 F.2d 1244, 1247 (7th Cir.1984); *Haskins Bros. & Co. v. Morgenthau*, 85 F.2d 677, 681 (App.D.C.1936) (applying the United States's immunity as sovereign to federal funds even though they were earmarked for a specific purpose). The money here is federal money. That various persons have claims against the United States in amounts exactly matching the funds, and intended by Congress to be paid from these funds, does not give those individuals a property interest in the money.

Thus, the states' plan would amount to direct regulation of federal property. In extracting funds from the Treasury, the states would effectively subordinate federal property to their own laws and appropriate that property, at least for a period, for themselves. While the states protest that they merely wish to "further[] the federal government's presumed purpose to return the unclaimed

property to its true owners," Reply Br. of Alabama et al. at 13, the Supremacy Clause does not permit them to take over a federal program just because they think they can do it better.

The outcome would be the same if we approached the Supremacy Clause analysis as a matter of preemption. A federal statute preempts a state law where the latter "stands as an obstacle to the accomplishment and execution of the full objectives of Congress." See *Louisiana Public Service Comm'n v. FCC*, 476 U.S. 355, 368-69, 106 S.Ct. 1890, 1898, 90 L.Ed.2d 369 (1986); see also *Fidelity Federal Savings & Loan Ass'n v. De La Cuesta*, 458 U.S. 141, 153, 102 S.Ct. 3014, 3022, 73 L.Ed.2d 664 (1982). In passing § 1322, Congress was concerned to preserve or advance the convenience both of the claimant in securing payment and of the government in making it. As one architect of § 1322 noted:

> This proviso is simply a time-saving bookkeeping device. Its object is to put all unclaimed money accounts under one head, so that they may be identified on the books of the Government. The transfer does not impair the principal of the fund or make the unclaimed moneys less available. On the contrary, it really makes them more easily identifiable and, if anything, more accessible when the parties who are entitled to them turn up to claim them.

78 Cong.Rec. H8244 (daily ed. May 7, 1934) (statement of Rep. Griffin); see also *Permanent Appropriations: Hearing Before the Subcomm. of the House Comm. on Appropriations*, 73d Cong., 2d Sess. at 216-27 (1934) ("Hearing") (statement of Rep. Griffin). Although some members of Congress questioned whether § 1322 was well suited to the stated goals, see Hearing at 354; cf. *id.* at 526, 916, that is irrelevant here; our acceptance of the states' position would plainly thwart Congress's aims. Transferring the money from the Treasury to the states would surely make it less, not more, accessible to claim-

ants, who presumably picture the federal government as the relevant payor. Alternatively, for the federal government to send the money off to a state, and then recoup it for purposes of payment, would multiply the transactions needed to accomplish the otherwise fairly simple federal objective. Few plans would more straightforwardly obstruct "the accomplishment and execution of the full objectives of Congress".

The states seek to bolster their position by suggesting that their custodial takings laws come to us with a patina of ancient history. To a large extent that patina belongs only to escheat provisions, which these are not. In any event, "[t]he relative importance to the State of its own law is not material when there is a conflict with a valid federal law, for the Framers of our Constitution provided that the federal law must prevail." *Fidelity Federal*, 458 U.S. at 153, 102 S.Ct. at 3022, quoting *Free v. Bland*, 369 U.S. 663, 666, 82 S.Ct. 1089, 1092, 8 L.Ed.2d 180 (1962).[2]

As to some of the trust funds, escheat of the claimant's right might well substitute the state for the claimant and entitle it to payment. This would clearly *not* be true for claims that by federal law expire as a result of the events that trigger escheat under state law (e.g., death intestate without heirs). Obviously nothing we say prevents state substitution for the claimant where that is consistent with § 1322 and other relevant federal statutes. See generally *United States v. Klein*, 303 U.S. 276, 58 S.Ct. 536, 82 L.Ed. 840 (1938). That the Supreme Court has treated escheat and custodial takings the same way in some contexts, see, e.g., *Texas v. New Jersey*, 380 U.S. 518, 85 S.Ct. 1136, 14 L.Ed.2d 49 (1965), does not make them equivalent in all contexts, and particularly not here, where the need for the distinction is manifest.

---

[2] The argument of three states that the Tenth Amendment forbids Congress to maintain custodial possession of the moneys is without merit.

Appellants rely heavily on *Roth v. Delano*, 338 U.S. 226, 70 S.Ct. 22, 94 L.Ed. 13 (1949), where the Supreme Court permitted a state to escheat abandoned accounts in a failed national bank. But neither *Roth* nor its predecessor, *Anderson Nat'l Bank v. Luckett*, 321 U.S. 233, 64 S.Ct. 599, 88 L.Ed. 692 (1944), which dealt explicitly with custodial takings as well as escheat, is controlling. Both cases involved state efforts to apply their unclaimed property statutes to national banks, which, though subject to heavy federal regulation, are nongovernmental firms. Both opinions emphasized that the state laws did not frustrate any discernible purpose underlying either the federal banking laws or any other federal statute. See *Roth*, 338 U.S. at 230, 70 S.Ct. at 24; *Anderson Nat'l Bank*, 321 U.S. at 248-49, 64 S.Ct. at 607-08. Here, by contrast, § 1322 seeks to advance the convenience of the federal government and its creditors by establishing specific federal accounts with which the states propose to interfere.

* * * *

The judgment of the District Court is affirmed.

So ordered.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

Civ. A. No. 88-3717

STATE OF ALABAMA, *et al.*,
Plaintiffs,

v.

CHARLES A. BOWSHER, *et al.*,
Defendants.

March 30, 1990

Andrew P. Miller, Bernard Nash, Peter J. Kadzik, Dickstein, Shapiro & Morin, Washington, D.C., Joe A. Walters, E. William Crotty, Donald S. Arbour, O'Connor and Hannon, Minneapolis, Minn., and Washington, D.C., for plaintiffs.

Sandra M. Schraibman, Mark H. Murphy, Dept. of Justice, Civ. Div., Washington, D.C., for defendants.

MEMORANDUM DECISION AND ORDER

REVERCOMB, District Judge.

The plaintiffs in this matter are twenty-three States who claim the right pursuant to their respective unclaimed property laws to custody of monies belonging to their respective citizens and contained in the United States Treasury trust fund receipt account "Unclaimed Moneys of Individuals Whose Whereabouts are Unknown" as established by 31 U.S.C. § 1322. The defendants in this matter are the Comptroller General of the United States

("Comptroller General") and the Secretary of the Treasury of the United States ("Secretary"). The plaintiffs seek to compel the Secretary and the Comptroller General to settle their claims for the monies in their favor and to disburse the monies accordingly. The plaintiffs also seek to compel the Secretary to provide information regarding the unclaimed monies.

This matter is before the Court pursuant to defendants' Motion for Judgment on the Pleadings or, in the Alternative, for Summary Judgment. The defendants contend that this action is barred by sovereign immunity, standing, ripeness, failure to state a claim, the Supremacy Clause and exhaustion.

I. STATUTORY AND ADMINISTRATIVE BACKGROUND

A. Unclaimed Monies Accounts

The account "Unclaimed Moneys of Individuals Whose Whereabouts are Unknown" is established in 31 U.S.C. § 1322.[1] That provision requires the Secretary to transfer

---

[1] Section 1322 provides:

(a) On September 30 of each year, the Secretary of the Treasury shall transfer to the Treasury trust fund receipt account "Unclaimed Moneys of Individuals Whose Whereabouts are Unknown" that part of the balance of a trust fund account named in section 1321(a)(1)—(82) of this title or an analogous trust fund established under section 1321(b) of this title that has been in the fund for more than one year and represents money belonging to individuals whose whereabouts are unknown. Subsequent claims to the transferred funds shall be paid from the account "Unclaimed Moneys of Individuals Whose Whereabouts are Unknown."

(b) Except as provided in subsection (c) of this section, necessary amounts are appropriated to the Secretary to make payments from—

(1) the Treasury trust fund receipt account "Unclaimed Moneys of Individuals Whose Whereabouts are Unknown"; and
(2) the United States Government account "Refund of Moneys

to that account those funds which had been in trust fund accounts listed in 31 U.S.C. § 1321(a)(1)-(82) or analogous trust funds listed in § 1321(b) for more than one year and which represent money belonging to individuals whose whereabouts are unknown.[2] Section 1322 expressly provides that subsequent claims to those monies are to be paid from that account and that necessary amounts will be appropriated for payment of those claims.

The Treasury Department has designated two funds to receive deposits of monies deemed unclaimed pursuant to 31 U.S.C. § 1322. Trust fund account number 20X6133 serves as a depository for monies in the amounts of $25.00 or more which meet certain criteria, and miscellaneous receipt account number 1060 serves as a depository for

---

Erroneously Received and Covered" and other collections erroneously deposited that are not properly chargeable to another appropriation.

Subsection (c)(1) of § 1322 references unclaimed Postal Savings Systems deposits and provides that the Secretary shall hold in the "Unclaimed Moneys" account "the balance remaining after the final distribution of unclaimed Postal Savings System deposits" and that balance shall be used "to pay claims for Postal Savings System deposits without regard to the State law or the law of other jurisdictions of deposit concerning the disposition of unclaimed or abandoned property."

[2] 31 U.S.C. § 1321(a)(1)—(82) includes such diverse sources of funds as (9) Library of Congress trust fund, investment account; (14) wages and effects of American seamen, Department of Commerce; (23) Pay of the Navy, deposit funds; (40) Petersburg National Military Park fund; (43) wages due American seamen; (53) unclaimed condemnation awards, Rock Creek and Potomac Parkway Commission; (67) Miscellaneous trust funds of Indian tribes.

Section 1321 does not include those funds from which the large majority of federal benefit payments are made. Many of those funds are subject to statutes which specifically provide for the retention or other disposition of unclaimed benefit payments. *See, e.g.*, Federal Employees Life Insurance Benefit Fund, 5 U.S.C. § 8705(d); Civil Service Retirement Fund, 5 U.S.C. § 8345(i); Federal Old-Age and Survivors Insurance Fund, 42 U.S.C. § 401(m); and Railroad Retirement Fund, 45 U.S.C. § 231.

monies in amounts of less than $25.00 and for those monies which do not otherwise meet the criteria for transfer into Account 20X6133.[3] *See* 1 Treasury Financial Manual ("TFM") § 6-3030.

The separate accounts were created to facilitate bookkeeping by the Treasury. Account 1060 is a true "miscellaneous receipts" account; deposits made into this account (unlike Account 20X6133) are not directly available for disbursement. In the event that claims are received by the transferring agencies for items transferred to Account 1060, and the facts indicate that refunds are justified, such claims are paid from account 20X1807 ("Refund of Moneys Erroneously Received and Covered") in accordance with the provisions of 1 TFM § 6-3075.

B. Procedures for Transfer of Unclaimed Monies Into the Secretary's Custody

The Secretary directs the federal agencies to analyze their various trust, revolving and deposit accounts periodically to determine whether they are holding unclaimed monies and, if so, to take appropriate action to initiate the transfer of such monies to the "unclaimed moneys" accounts. 1 TFM § 6-3030. Although the Treasury Department serves a centralized role as custodian of government funds, it has neither the access to agency records necessary to determine which monies have been held for over one year in the agency accounts nor certifying authority to order the transfer of monies from those accounts to the unclaimed monies accounts. Agencies transfer monies into the unclaimed monies accounts by submitting either a Statement of Transaction (Standard Form 224) or its electronic equivalent. 1 TFM § 6-3040.

---

[3] Transfer of monies into Account 20X6133 must meet the following criteria: "(a) amount of $25.00 or more; (b) a refund, upon a claim, would be absolutely justified; (c) there is no doubt as to legal ownership of the funds; (d) a named individual, business, or other entity can be identified with the item." 1 TFM § 6-3040.10.

The Treasury Department, through its Financial Management Service ("FMS"), maintains only the cumulative or government-wide balance of the unclaimed monies accounts, which reflects the monthly composite balance of deposits and withdrawals. The FMS maintains no records about the nature or origin of any monies transferred into the unclaimed monies accounts by the various agencies, including those within the Treasury Department (*e.g.*, Internal Revenue Service, Bureau of Public Debt). Any such records would be maintained exclusively by the various agencies themselves. 1 TFM § 6-3085. The exact nature of these records may vary from agency to agency. The FMS has no independent knowledge of the internal accounting practices of any other agency or bureau concerning unclaimed monies and has no government-wide auditing function.

C. The Claims-Payment Scheme

Accountability for public monies in civilian agencies generally rests with the certifying official of the transferring agency, who has been charged with the responsibility of reviewing, *inter alia*, the "information stated in the certificate, voucher, and supporting records . . . [and] the legality of a proposed payment under the appropriation or fund involved" and, if appropriate, certifying vouchers for payment. 31 U.S.C. § 3528; *see also* 1 TFM §§ 6-3060, 3075. If the certifying official has a question regarding the legality or propriety of the claim—and if Congress has not vested claims settlement in that administrative agency—the agency can submit the matter to the General Accounting Office. 1 TFM § 6-3050; *see also* GAO Policy and Procedures Manual for Guidance of Federal Agencies, title 7, § 21.11 (1983).[4]

---

[4] Pursuant to 31 U.S.C. § 3702, the Comptroller General is authorized to "settle all claims of or against the United States." The term "settlement" applies not in the compromise sense, but "has been used from the beginning to describe administrative determination

Should the transferring agency determine that the claim for monies is legal and proper, the certifying official will initiate payment through the certification of a Voucher and Schedule of Payment Standard Form 1166 or its electronic certification equivalent. 1 TFM § 6-3060. This payment voucher is then transmitted to a disbursing official, who for most civilian Executive Branch agencies is an employee or official of the Treasury Department.[5] 31 U.S.C. § 3321(a). Since the Secretary's authority to act as disbursing official is expressly limited by 31 U.S.C. § 3321(a) to executive agencies, the Legislative and Judicial Branch agencies have their own disbursing authority. *See* 2 U.S.C. § 104a (House of Representatives); 2 U.S.C. §§ 142b, d, e (Library of Congress); 2 U.S.C. § 143 (Architect of the Capitol); 28 U.S.C. § 604(a)(8) (Administrative Office of the U.S. Courts).

---

of the amount due." *Illinois Surety Co. v. United States ex rel. Peeler*, 240 U.S. 214, 219-22, 36 S.Ct. 321, 323-24, 60 L.Ed. 609 (1916). "A claim for purposes of GAO's claims settlement authority means a monetary claim—a claim for the payment of money. Without specific statutory authority GAO is not authorized to consider claims for equitable relief, such as specific performance . . . or the recrediting of sick leave. . . ." *GAO, Principles of Federal Appropriations Law* at 11-8 (1982).

In recognition that Congress has in certain instances vested other agencies with authority to settle claims, GAO regulations provide claims procedures at 4 C.F.R. Part 31 which apply "to all classes of claims by and against the United States except: (a) Those claims which are under the exclusive jurisdiction of administrative agencies pursuant to specific statutory authority." 4 C.F.R. § 30.1. GAO has also in certain instances limited its jurisdiction on certain claims, including claims for monies filed in Accounts 20X6133 and 1060.

[5] By statute, however, the disbursing officials for the United States Marshal's Office and the "military departments of the Department of Defense (except for disbursements for departmental pay and expenses in the District of Columbia)" are not Treasury Department employees but, rather, are agency employees designated by the heads of those particular agencies. 31 U.S.C. § 3321(c).

Pursuant to 31 U.S.C. § 3325(a), "[a] disbursing official in the executive branch of the United States Government shall (1) disburse money only as provided by a voucher certified by (A) the head of the executive agency concerned; or (B) an officer or employee of the executive agency having written authorization from the head of the agency to certify vouchers." For those agencies for which Treasury Department officials are the disbursing officials, vouchers are sent by the transferring agencies to FMS' Regional Financial Centers instructing payments according to the information contained in the vouchers. The disbursing officials do not review the vouchers to determine the legality or propriety of the underlying claims but, rather, the Regional Financial Centers examine the vouchers to determine if they are in the proper format, have been duly certified and are correctly computed. 31 U.S.C. § 3325(a)(2). The FMS then mails out the payments to the address contained on the form. The Agency Confirmation Report is transmitted to the finance office of the transferring agency as a record of payment.[6] The other agencies which have both certifying and disbursing authority will issue their own payments and notify the Treasury Department of the composite monthly balance. 1 TFM §§ 6-3060, 3075.

Payment of claims for monies in accounts 20X6133 or 1060 are not made through direct contact between the claimant and the FMS (unless the FMS also is the transferring agency for the particular monies claimed). Nor are payments from these accounts made by the General Accounting Office. They are made upon authorization of the individual agencies without claims settlement action by GAO. 1 TFM §§ 6-3050, 3060, 3075; *see also* GAO Policies and Procedures for Guidance of Federal Agencies, Title 7, § 21.11. The Treasury Department is not

---

[6] Disbursal of monies from Account 1060 differs from the above-discussed procedures only to the extent that claims for monies deposited into Account 1060 must be paid from Account 20X1807, "Refund of Money Erroneously Received and Covered." *See* 1 TFM §§ 6-3070, 3075.

aware of the procedural requirements of other agencies or bureaus for perfecting claims, nor does the Treasury Department set out procedures for determining whether a claim is valid and recoverable.[7]

---

[7] The plaintiffs fail to dispute the existence of the administrative scheme detailed in the Treasury Financial Manual and upon which the defendants extensively rely in compiling their Rule 108(h) statement. Indeed, the plaintiffs completely ignore the TFM in their own Rule 108(h) statement and in their *Opposition to Defendants' Motion for Judgment on the Pleadings or, in the Alternative, for Summary Judgment* ("*Opposition to Defendants' Motion*"). Rather, the plaintiffs contend that this administrative scheme is inconsistent with § 1322 or, in the alternative, that they are not required to comply with it pursuant to their state unclaimed property laws and the Tenth Amendment. However, these are legal issues and not factual disputes. Accordingly, this Court has deemed admitted all facts identified in defendants' Rule 108(h) statement which the plaintiffs have specifically failed to controvert.

The thrust of *Plaintiffs' Statement of Material Facts in Genuine Dispute* is legal and not factual. For example, plaintiffs contend that "[t]here are no administrative procedures plaintiffs must exhaust to obtain monies held by the Secretary of the Treasury in the unclaimed monies accounts" and "[i]f such procedures do exist, the States are not required to comply with federal administrative procedures applicable to individual claimants in order for the States to recover the monies pursuant to their unclaimed property statutes." *Id.* ¶¶ 6, 7. However, whether the plaintiffs must exhaust the administrative scheme established by the Secretary in the TFM to obtain the unclaimed monies or whether they can rely on their unclaimed property laws is precisely the legal issue at the center of this case. Plaintiffs' *Opposition to Defendants' Motion* expressly provides:

> This is not a complicated lawsuit. The issues are basic and straightforward. The question to be resolved is whether the Secretary, as a holder of unclaimed property as defined under the States' unclaimed property laws, must comply with these laws like any other holder.

Id. at 7. This Court fully agrees with plaintiffs that "[t]his is a *legal dispute* over the right to unclaimed funds that have been transferred to the unclaimed monies accounts." *Id.* at 49 (emphasis added).

The few actual facts which the plaintiffs recite as in dispute are not material to a determination of this case.

D. Plaintiffs' Contacts with the Defendants and the Transferring Agencies

None of the plaintiff States claim to have escheated the monies they seek, that is, to have obtained legal title to or actual ownership of the monies through due process procedures which divest the owners of their interests therein. The plaintiff States have not filed claims for custody of monies contained in the unclaimed monies accounts with the transferring agencies.[8] Indeed, the plaintiff States have not even contacted the transferring agencies for information on how to proceed or for the identification of unclaimed monies which belong to the citizens of their respective States.

On December 14, 1988, six States, Arizona, Delaware, Illinois, Kansas, Kentucky and Pennsylvania, sent a letter to the Comptroller General which requested: (1) "an acknowledgment that the states have a valid claim" to unspecified monies in the unclaimed monies accounts; (2) a listing of existing trust funds from which the monies had been transferred and of the amounts transferred, as well as the identities of the transferring agencies; (3) "A listing of any procedures, administrative or otherwise, that the states must complete in order to perfect their claims;" and (4) "assurances" that the monies would not be disbursed except to the "lawful owners of the moneys or their respective states of residence." The

---

[8] The Treasury Department has identified seventeen agencies which have transferred monies into Accounts 20X6133 and/or 1060 since 1984. Those agencies include the U.S. House of Representatives, Architect of the Capitol, Library of Congress and Administrative Office of the U.S. Courts, all of which have their own disbursing authority; three military departments (Army, Navy and Air Force) which also have their own disbursing authority, with certain limited exceptions, *see* 31 U.S.C. § 3321; and the following civilian Executive Branch agencies for which Treasury officials act as disbursing officers: The Departments of Agriculture, Commerce, Energy, Health and Human Services, Interior, Justice, Labor, Transportation, Treasury, and Veterans Affairs.

States threatened to sue if they did not "receive an acknowledgment of the validity of their claim asserted herein" within two weeks.

On December 30, 1988, the six States, plus the State of Rhode Island, filed the instant action.

On January 3, 1989, Gary L. Kepplinger, Associate General Counsel of the GAO, responded to the December 14, 1988 letter. Kepplinger stated that although GAO "has the statutory authority to settle claims against the United States," such claims "usually involve a claim for a specific amount due." He noted that the December 14 letter, in contrast, "merely requests a general acknowledgment or declaration of your clients' rights and status *vis-a-vis* funds in the unclaimed moneys account as well as the necessary information to perfect your clients' claims. Such a declaratory action is beyond the realm of the [GAO's] claims settlement jurisdiction." Kepplinger further stated that payments from the "unclaimed moneys account" are made "without settlement action by GAO." GAO would only consider such claims "in those cases where the Treasury Department or other agency questions the legality or propriety of any claim."

After the instant suit was filed, five of the plaintiff States (Arizona, Illinois, Kansas, Nevada and Utah) sent letters to Bettsy H. Hettinger, the Director of the Cash Management Division of the Financial Management Service at Treasury, requesting her, in effect, to "search her records for, and produce a listing of, unclaimed property in the custody of federal agencies which are the property of residents of their States." One of the States, Nevada, also asked that Hettinger "report and remit" the monies listed to the State's Unclaimed Property Division. Hettinger replied to the five States, by letter dated April 24, 1989, that "FMS does not maintain any record of these deposits other than a cumulative dollar figure. The depositing agencies retain the only supporting documentation necessary to identify these funds."

Hettinger advised the States that "[i]n order to file claims on any of these funds, you will need to contact the individual agencies believed to be holding funds payable to your residents."

On April 10, 1989, the complaint was amended to add as plaintiffs Alabama, Hawaii, Minnesota, Ohio, Nevada, South Dakota and Utah. On October 6, 1989, the complaint was amended to add as plaintiffs Florida, Iowa, Louisiana, Missouri and Oklahoma. On December 29, 1989, the complaint was amended to add as plaintiffs Montana, New Hampshire, West Virginia and Wisconsin.

II. SOVEREIGN IMMUNITY

The defendants contend that the instant action is barred by the doctrine of sovereign immunity where the plaintiffs seek, *inter alia*, to compel the defendants to disburse funds in the possession of the federal government and to disburse information. *See Dugan v. Rank*, 372 U.S. 609, 620, 83 S.Ct. 999, 1006, 10 L.Ed.2d 15 (1963); *Stafford v. Briggs*, 444 U.S. 527, 542 n. 10, 100 S.Ct. 774, 784 n. 10, 63 L.Ed.2d 1 (1980). The defendants contend the plaintiffs "must establish that the United States has waived its immunity with respect to this type of lawsuit." *State of Florida v. United States Dep't of the Interior*, 768 F.2d 1248, 1253 (11th Cir.1985), *cert. denied*, 475 U.S. 1011, 106 S.Ct. 1186, 89 L.Ed.2d 302 (1986); *see also United States v. Mitchell*, 445 U.S. 535, 538, 100 S.Ct. 1349, 1351, 63 L.Ed.2d 607 (1980); *United States v. Testan*, 424 U.S. 392, 399, 96 S.Ct. 948, 953, 47 L.Ed.2d 114 (1976).

Congress has expressly waived sovereign immunity in suits seeking equitable relief against the federal government in section 702 of the Administrative Procedure Act ("APA") which provides:

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency

> action within the meaning of a relevant statute, is entitled to review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States.

5 U.S.C. § 702.[9]

Although the instant suit is not brought under the APA, the caselaw of this circuit confirms that "the waiver applies to any suit, whether under the APA, [28 U.S.C.] § 1331, § 1361, or any other statute." P. Bator, P. Mishkin, D. Meltzer & D. Shapiro, *Hart and Wechsler's The Federal Courts and The Federal System* 1154 (3d ed. 1988); *see, e.g., National Ass'n of Counties v. Baker*, 842 F.2d 369, 373 (D.C.Cir.1988), *cert. denied*, —— U.S. ——, 109 S.Ct. 784, 102 L.Ed.2d 775 (1989) (section 702 waived sovereign immunity in action to compel the Secretary to disburse certain appropriated funds); *Schnapper v. Foley*, 667 F.2d 102 (D.C.Cir.1981), *cert. denied*, 455 U.S. 948, 102 S.Ct. 1448, 71 L.Ed.2d 661 (1982) (section 702 waived sovereign immunity in copyright case); *Sea-land Service, Inc. v. Alaska R.R.*, 659 F.2d 243, 244 (D.C.Cir.1981), *cert. denied*, 455 U.S. 919, 102 S.Ct. 1274, 71 L.Ed.2d 459 (1982). The issue of whether section 702 acts as a waiver to actions other than those brought under the APA was definitively put to rest by the Supreme Court in *Bowen v. Massachusetts*, 487 U.S. 879, 108 S.Ct. 2722, 101 L.Ed.2d 749 (1988). In *Bowen v. Massachusetts*, the State of Massachusetts

---

[9] Section 702 applies to all equitable actions "except to the extent that (1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law." 5 U.S.C. § 701(a).

brought suit in federal court, invoking 28 U.S.C. § 1331, to challenge a decision by the Secretary of Health and Human Services disallowing reimbursement for certain State expenditures for mental health services under 42 U.S.C. § 1316(d). The Court expressly held that section 702 operated as a waiver of sovereign immunity to judicial review of the action brought by the State challenging the Secretary's disallowance decision. *Id.* 108 S.Ct. at 2731.

The defendants nonetheless contend that the terms of the waiver in section 702 do not apply to the instant action because the plaintiffs cannot demonstrate that they have been wronged by final agency action.[10] The defend-

---

[10] Although the plaintiffs are seeking the disbursement of monies in the possession of the federal treasury, the defendants do not dispute that under section 702 this relief constitutes equitable rather than money damages. In *Bowen v. Massachusetts*, the Court held that a transfer of federal monies to Massachusetts as reimbursement for its expenditures would not constitute money damages. 108 S.Ct. at 2740. The Court distinguished an award of money used as specific relief from an award of "money damages":

> "We begin with the ordinary meaning of the words Congress employed. The term 'money damages,' 5 U.S.C.A. § 702, we think, normally refers to a sum of money used as compensatory relief. Damages are given to the plaintiff to *substitute* for a suffered loss, whereas specific remedies 'are not substitute remedies at all, but attempt to give the plaintiff the very thing to which he was entitled.' D. Dobs, *Handbook on the Law of Remedies* 135 (1973). Thus, while in many instances an award of money is an award of damages, '[o]ccasionally a money award is also a specific remedy.' *Id.* Courts frequently describe equitable actions for monetary relief under a contract in exactly those terms."

Id. at 2732-33 (emphasis in original) (quoting *Maryland Dep't of Human Resources v. Department of Health and Human Servs.*, 763 F.2d 1441, 1446 [D.C.Cir.1985]). This Court cannot imagine any claim for monies which could be more equitable in nature than the instant case where the plaintiffs are seeking specific monies within the unclaimed monies accounts which they claim they are entitled to under their state law.

ants argue that there is no final agency action which has wronged the plaintiffs because they have failed to apply to the transferring agencies who are the necessary parties to act upon plaintiffs' claims. The defendants contend that if the plaintiffs made such action, then they very well might obtain the relief that they seek.

As a threshold matter, the defendants are essentially conflating their sovereign immunity argument with their exhaustion argument.[11] The problem with the defendants' position is that it ignores the very premise of the lawsuit, namely, that the plaintiffs contend they do not have to apply to the separate agencies but can proceed directly against the defendants for relief. The defendants have apprised the plaintiffs that they will not directly act upon the plaintiffs' claims and this is precisely the agency action that the plaintiffs claim is harming them. The defendants do not contend that there are any other procedures other than through judicial review by which the plaintiffs can challenge the defendants' requirement that the plaintiffs apply to the transferring agencies.

More fundamentally, however, the defendants' argument is premised on the view that the waiver of sovereign immunity in section 702 only applies to final

---

[11] One of the reasons for the enactment of the sovereign immunity waiver in section 702 was to eliminate misplaced reliance on sovereign immunity as a means of foreclosing judicial review of a particular government activity:

> The need to channel and restrict judicial control over administrative agencies, Congress concluded, could be better achieved through doctrines such as statutory preclusion, exhaustion, and justiciability, rather than through "the confusing doctrine of sovereign immunity." [Citation omitted.] Accordingly, § 702 was designed to "eliminate the defense of sovereign immunity as to any action in a Federal court seeking relief other than money damages and stating a claim based on the assertion of unlawful official action by an agency or by an officer or employee of the agency." [Citation omitted.]

The Presbyterian Church v. United States, 870 F.2d 518, 524 (9th Cir. 1989).

"agency action" defined in 5 U.S.C. § 551(13) as "an agency rule, order, license, sanction, relief, or the equivalent or denial thereof." In light of the plain broadsweeping language of the waiver of sovereign immunity and its clear legislative history, this Court does not accept the defendants' argument.[12]

In *The Presbyterian Church v. United States*, 870 F.2d 518, the court addressed the precise argument which the defendants are making in the instant case, namely, that § 702's waiver of sovereign immunity applies only to "agency action" as defined by the APA. The court squarely rejected that argument, holding:

> Nothing in the language of the amendment suggests that the waiver of sovereign immunity is limited to claims challenging conduct falling in the narrow definition of "agency action". . . .
>
> * * * *
>
> Moreover, nothing in the legislative history of the 1976 amendment of § 702 suggests that Congress intended to limit the waiver of sovereign immunity to the specific forms of "agency action" enumerated in § 551(13). On the contrary, Congress stated that "the time [has] now come to eliminate the sovereign immunity defense in *all* equitable actions for specific relief against a Federal agency or officer acting in an official capacity." [Citation omitted.] * * * This waiver was clearly intended to cover the full spectrum of agency conduct, regardless of whether it fell within the technical definition of "agency action" contained in § 551(13).

Id. at 525. The defendants make no effort to challenge or distinguish *Presbyterian Church* and this Court accepts its holding and rationale as persuasive.

---

[12] Accordingly, this Court does not need to decide whether the defendants' refusal to directly act upon plaintiffs' request for relief constitutes "agency action" within the meaning of § 551(13).

Accordingly, this Court rules that the plaintiffs' action is not barred by the doctrine of sovereign immunity because section 702 expressly waives that immunity.[13]

---

[13] The plaintiffs further contend that even if there were no express waiver, the doctrine of sovereign immunity does not bar actions which seek the disbursement of federal monies owed to others. However, "[a]lthough plaintiffs' position that they are not suing for the government's money may have some logical appeal, it has been argued and rejected many times before." *Brockelman v. Brockelman*, 478 F.Supp. 141, 142, 143 (D.Kan.1979) (court rejected argument that sovereign immunity does not attach where "the plaintiffs seek not money belonging to the government, but instead money belonging to the defendants which is merely in the hands of the government"); *see also Buchanan v. Alexander*, 45 U.S. (4 How.) 20, 20-21, 11 L.Ed. 857 (1846) ("So long as money remains in the hands of a disbursing officer, it is as much the money of the United States as if it had not been drawn from the treasury."); *Haskins Bros. & Co. v. Morgenthau*, 85 F.2d 677, 681 (D.C.Cir.), *cert. denied*, 229 U.S. 588, 57 S.Ct. 118, 81 L.Ed.433 (1936) (monies which come into the "possession of the United States charged with a trust . . . are nevertheless public monies . . . which the United States are charged with the duty of conserving").

The plaintiffs cite *United States v. Klein*, 303 U.S. 276, 58 S.Ct. 536, 82 L.Ed. 840 (1938), as support for the proposition that the fact that the property at issue is in federal custody does not, under the doctrine of sovereign immunity, preclude a party from bringing a suit for its recovery. In *United States v. Klein*, the Court held that the Pennsylvania state courts could, under the State's echeat statutes, declare an escheat of bonds that had been paid into the registry of a federal district court by a third party and subsequently transferred to the United States treasury. The basis of the Court's rationale upholding the constitutionality of the escheat provisions was twofold. First, the government did not claim that it had any right, title or interest in the funds or that the funds could otherwise escheat to the United States. *Id.* at 280, 58 S.Ct. at 538. More fundamentally, however, the Supreme Court expressly noted that the escheat proceeding was *not* an action for the recovery of the funds from the federal government but was simply a proceeding to declare title to the funds:

> The present decree for escheat of the fund is not founded on possession and does not disturb or purport to effect the Treasury's possession of the fund or the district's authority over it. Nor could it do so. [Citations omitted.] At most the decree

III. STANDING

The defendants further contend that this court is without jurisdiction to hear this action because the plaintiffs lack standing.

The requirement of standing is premised on "Article III of the Constitution [which] confines the federal courts to adjudicating actual 'cases' and controversies.'" *Allen v. Wright*, 468 U.S. 737, 750, 104 S.Ct. 3315, 3324, 82 L.Ed.2d 556 (1984). Standing is necessary to the jurisdiction of this Court to hear this matter. *See Warth v. Seldin*, 422 U.S. 490, 498-99, 95 S.Ct. 2197, 2204-05, 45 L.Ed.2d 343 (1975) (whether a plaintiff "has made out a 'case or controversy . . . within the meaning of Article III . . . is the threshold question in every federal case, determining the power of the court to entertain suit.").

The Supreme Court has developed a three-prong model by which to assess Article III standing. A plaintiff must allege: (1) a "personal injury" that is (2) "fairly traceable to the defendant's allegedly unlawful conduct," and (3) which is "likely to be redressed by the requested relief." *Allen*, 468 U.S. at 751, 104 S.Ct. at 3324; *see also Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 72, 98 S.Ct. 2620, 2630, 57

> of the state court purports to be an adjudication upon the title of the unknown claimants in the fund . . . [citations omitted], and to confirm the authority of [the State] to make claim to the moneys.

Id. at 282, 58 S.Ct. at 539. In order to actually recover the funds (and hence disturb the Treasury's possession), the State to whom the funds had escheated would have to petition the district court for an order that the moneys be paid to the State. Accordingly, the escheat statutes which were at issue in *United States v. Klein* did not even purport to be an action for the recovery of funds from the federal treasury. Whether the funds were ever in fact removed from the federal treasury was not a function of the independent escheat proceedings in the state courts but a function of the district court's exclusive jurisdiction to dispose of the bonds which it had earlier ordered deposited into its registry. *Id.* at 281, 58 S.Ct. at 538.

L.Ed.2d 595 (1978); *Dellums v. United States Nuclear Regulatory Comm'n*, 863 F.2d 968 (D.C.Cir.1988). The court should apply the three factors to the facts at hand with the following questions in mind: "Is the injury too abstract, or otherwise not appropriate, to be considered judicially cognizable? Is the line of causation between the illegal conduct and injury too attenuated? Is the prospect of obtaining relief from the injury as a result of a favorable ruling too speculative?" *Allen*, 468 U.S. at 752, 104 S.Ct. at 3325.

The burden of establishing standing is on the plaintiff. More fully,

> the Court must accept as true all material allegations of the complaint and construe it in favor of plaintiffs, and it may consider matters extrinsic to the complaint itself deemed supportive of plaintiffs' standing. [Citation omitted.] If however, the facts alleged do not permit a reasonable inference that defendants' putatively unlawful conduct caused the harm, or that if the relief requested is afforded the injury will be rectified, standing has not been shown, and the complaint must be dismissed.

Khalef v. Regan, 85-1 U.S. Tax Cas. (CCH) ¶ 9269 (D. D.C.1985), *aff'd*, No. 85-5274 (D.C.Cir. Sept. 19, 1986); *see generally Fulani v. Brady*, 729 F.Supp. 158 (D.D.C. 1990).

A. Injury

The defendants claim that the plaintiffs can demonstrate no injury because "[t]hey have not received a determination from the defendants that they are not entitled to the monies they seek." *Defendants' Motion for Judgment* at 30. More specifically, the defendants are contending that until the plaintiffs have exhausted their administrative remedies they cannot claim injury. However, such a position fundamentally mischaracterizes the plain-

tiffs' claims where the plaintiffs are contending that the defendants' directive to apply to the transferring agencies and to exhaust those administrative remedies is the precise injury of which they complain in the instant case as undermining their state unclaimed property laws. "It is common ground that States have an interest, as sovereigns, in exercising 'the power to create and enforce a legal code.'" *Alaska v. United States Department of Transportation*, 868 F.2d 441, 443 (D.C.Cir.1989) (State granted standing where injury asserted is improper federal preemption of State consumer protection statutes) (quoting *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 601, 102 S.Ct. 3260, 3265, 73 L.Ed.2d 995 (1982)).

The plaintiffs contend that under their unclaimed property laws they are entitled to proceed directly against the Secretary as "holder" of those funds and to compel the Comptroller to settle their claims.[14] More specifically, the plaintiffs contend that the defendants, as "holders" under their unclaimed property laws, have failed to provide a report identifying the owners of the unclaimed monies [15]

---

[14] The States' unclaimed property statutes define a "holder" as any person who is in possession of property belonging to another, is a trustee, or is indebted to another on an obligation. The statutes' definition of "person" includes governmental or political subdivisions. *See* Ala. Code § 35-12-21 (1975); Ariz.Rev.Stat.Ann. § 44-301 (Cum. Supp. 1989); 12 Del.Code Ann. § 1198 (1987); Haw.Rev.Stat. § 523A-1 (1985); Ill.Ann.Stat. ch. 141, ¶ 101 (Smith-Hurd 1986); Iowa Code § 556.1 (Supp.1989); Kan.Stat.Ann. § 58-3901 (1983); Ky.Rev.Stat Ann. §§ 393.010, 393.068 (Michie 1984); La.Rev.Stat. Ann. § 9:152 (West Supp.1989); Mo.Rev.Stat. § 447.503 (Supp. 1989); Nev.Rev.Stat. §§ 120A.080, 120A.110 (1986); Okla.Stat. tit. 60, § 651 (1971); 72 Pa.Cons.Stat.Ann. § 1301.1 (Purdon Supp. 1989); R.I.Gen.Laws § 33-21.1-1 (Cum.Supp. 1989); S.D. Codified Laws Ann. § 43-41A-1 (Supp. 1989); and Utah Code Ann. § 78-44-2 (1987).

[15] *See* Ala.Code § 35-12-31 (1977); Ariz.Rev.Stat.Ann. § 44-317 (1987); 12 Del.Code Ann. § 1199 (1987 & Cum.Supp.1988); Haw. Rev.Stat. ¶ 523A-17 (1985 & Supp.1988); Ill.Ann.Stat. ch. 141,

and to disburse to the plaintiffs all specific monies which they are entitled to hold as custodians.[16] There is no dispute that the defendants will neither identify the owners of the unclaimed monies nor disburse the monies to plaintiffs without a certifying voucher from the transferring agency to which the defendants contend the plaintiffs must apply.

B. Causation

The defendants further contend that even if the plaintiffs could demonstrate an injury, they fail to meet the causation requirement because the "plaintiffs cannot credibly claim that 'but for' the alleged actions of the defendants, they would have received the monies, since the

---

¶ 111 (Smith-Hurd 1986 & Cum.Supp. 1989); Iowa Code § 556.11, *amended by* Iowa Senate File 407, 73d General Assembly (effective July 1, 1989); 1989 Kan.Sess.Laws Ch. 170, § 9; Ky.Rev.Stat.Ann. § 393.110 (Michie Cum.Supp. 1988); La.Rev.Stat.Ann. § 9:168 (West Supp. 1989); Mo.Rev.Stat. § 447.539, *amended by* Mo. House Bill No. 506, 85th General Assembly (effective August 28, 1989); Nev.Rev.Stat. §§ 120A.250 to 120A.260 (Cum.Supp.1989); Okla.Stat. tit. 60, § 661 (1971 & Supp.1989); 72 Pa.Cons.Stat.Ann. § 1301.11 (Purdon Supp. 1989); R.I.Gen.Laws § 33-21.1-17 (Cum.Supp.1989); S.D. Codified Laws Ann. §§ 43-41A-19 to 43-41A-21 (1983 & Supp. 1989); and Utah Code Ann. § 78-44-18 (1987).

[16] Holders have a duty under the States' statutes to remit the unclaimed property of which they are in possession to the States. *See* Ala.Code § 35-12-33 (1975); Ariz.Rev.Stat.Ann. § 44-319 (Cum. Supp.1989); 12 Del.Code Ann. § 1201 (1987 & Cum.Supp.1988); Haw.Rev.Stat. §§ 523A-19, 523A-53 (1985 & Supp.1988); Ill.Ann. Stat. ch. 141, ¶ 113 (Smith-Hurd 1986 & Cum.Supp.1989); Iowa Code § 556.13, *amended by* Iowa Senate File 407, 73d General Assembly (effective July 1, 1989); Kan.Stat.Ann. § 58-3914 (1983); Ky.Rev. Stat.Ann. § 393.110 (Michie Cum.Supp.1988); La.Rev.Stat.Ann. § 9:170 (West Supp.1989); Mo.Rev.Stat. § 447.543, *amended by* Mo. House Bill No. 506, 85th General Assembly (effective August 28, 1989); Nev.Rev.Stat. § 120A.320 (Cum.Supp.1989); Okla.Stat. tit. 60, § 663 (1971 & Supp. 1989); 72 Pa.Cons.Stat.Ann. § 1301.13 (Purdon Supp.1989); R.I.Gen.Laws § 33-21.1-19 (Cum.Supp.1989); S.D. Codified Laws Ann. § 43-41A-27 (1983 & Supp.1989); and Utah Code Ann. § 78-44-20 (1987).

initial decision whether plaintiffs' claims should be paid rests with independent third parties that are not parties to this action." *Defendants' Motion for Judgment* at 31-32. Again, however, the defendants are not comprehending the thrust of the plaintiffs' complaint which is that they do not have to apply to those independent third parties for the relief that they seek. In other words, the plaintiffs are claiming that as a matter of state law the defendants are the precise parties who should, in the first and final instance, make the decision whether the plaintiffs claims should be recognized and the monies disbursed accordingly.

C. Redressability

Finally, the defendants contend that the plaintiffs cannot establish the redressability requirement of standing. Specifically, the defendants contend that Congress has set up a statutory scheme whereby the Secretary has no authority to disburse monies for four of the transferring agencies (House of Representatives, Library of Congress, Architect of the Capitol and Administrative Office of the U.S. Courts), no authority to disburse for the Departments of Navy, Army and Air Force (with limited exceptions), and no authority to disburse monies without a certified voucher from the remaining transferring agencies. The defendants contend that this Court cannot order them to comply with the plaintiffs' proposed relief because to do so would require the defendants to circumvent the statutory scheme as established by Congress.

The defendants rely upon *Haskins Bros. & Co. v. Morgenthau*, 85 F.2d 677 (D.C.Cir. 1936), where the court held that the defendants "duties are to receive and preserve the public money and not to disburse it except conformably to law" and that accordingly "[w]e know of no power in this or any other court to compel the Secretary of the Treasury or the Treasurer of the United States, in a suit brought against them in their official capacities, to

pay out money in the treasury in a manner contrary to that directed by Congress." *Id.* at 680-81; *see also Royal Indemnity Co. v. United States*, 313 U.S. 289, 294, 61 S.Ct. 995, 996, 85 L.Ed. 1361 (1941); *Fansteel Metallurgical Corp. v. United States*, 145 Ct.Cl. 496, 172 F. Supp. 268, 270 (1959).

Obviously this Court can do no more than order the defendants to comply with the law but the very question begged is whether the defendants' interpretation of the statutory scheme for the disbursement of unclaimed monies under § 1322 is correct. If the defendants' interpretation of the statutory scheme is incorrect then this Court can order the defendants to comply with it and to enact regulations accordingly. *See Center for Auto Safety v. National Highway Traffic Safety Administration*, 793 F.2d 1322, 1334 (D.C.Cir.1986) (standing granted to consumer organizations challenging new fuel economy standards for cars because injury, the lack of fuel efficient vehicles, would be redressed by ruling requiring increased fuel efficiency); *Action Alliance of Senior Citizens v. Heckler*, 789 F.2d 931, 936-39 (D.C.Cir.1986) (plaintiffs challenging Health and Human Services' regulations granted standing since, *inter alia*, a court-ordered change in the regulations at issue would redress their injury). Furthermore, even assuming that the defendants' interpretation is correct, the plaintiffs alternatively challenge its constitutionality under the Tenth Amendment. This Court certainly has the power to strike down the statutory and administrative scheme relied upon by the defendants if it in fact violates the Tenth Amendment. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176-80, 2 L.Ed. 60 (1803).

Accordingly, this Court rules that the plaintiffs have standing to bring this action.

IV. RIPENESS

The basic rationale for the ripeness doctrine is

> to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.

Abbott Laboratories v. Gardner, 387 U.S. 136, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967). Courts determine ripeness by evaluating "both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." 387 U.S. at 148-49, 87 S.Ct. at 1515.

A. Fitness of Decision for Judicial Review

In determining fitness of the issues for review, courts look to "whether the issue presented is a purely legal one, whether consideration of that issue would benefit from a more concrete setting, and whether the agency's action is sufficiently final." *Ciba-Geigy Corp. v. United States Environmental Protection Agency*, 801 F.2d 430, 435 (D.C. Cir.1986). As the Supreme Court has provided, in order to be "ripe for review" the "disagreement must not be nebulous or contingent but must have taken on fixed and final shape so that a court can see what legal issues it is deciding, what effect its decision will have on the adversaries, and some useful purpose to be achieved in deciding them." *Public Serv. Comm'n v. Wycoff Co.*, 344 U.S. 237, 244, 73 S.Ct. 236, 240, 97 L.Ed. 291 (1952).

The defendants contend that the plaintiffs' action must fail under the ripeness doctrine because "[t]here has been no final agency action by either of the defendants or any other agency on the merits of plaintiffs' entitlement to custody of the monies." *Defendants' Motion for Judgment* at 44. Again, however, such a position ignores the funda-

mental import of the plaintiffs' claims and essentially begs the question that is presented in this case. Although the defendants correctly represent that there has been no agency decision denying the merits of the plaintiffs' claims of entitlement to the monies, the defendants at the same time claim that they are not the proper parties to make that determination and that the plaintiffs must apply to the transferring agencies. The plaintiffs, on the other hand, contend that they do not have to apply to these transferring agencies and have accordingly filed this suit to compel the defendants to make a determination on and disbursement of the monies to which the States claim they are entitled. Although the defendants contend there are complex factual issues which have never been addressed, i.e., the amounts being claimed, the underlying funds from which those monies have been transferred, and the particular interests of the individual states and of the federal government, before these issues can be addressed it must first be determined *who* should address those issues, namely, the defendants or the transferring agencies. The issue of who must resolve the underlying factual issues is precisely what this matter is all about and is fit for review.

B. Hardship

The defendants contend that when weighing hardship, "the fact that there are available administrative remedies which are not even referred to, much less shown to have been exhausted, is also crucial." However, in the decisions relied upon by the defendants the administrative channels themselves were not being challenged. In the instant case, the plaintiffs are contending that they do not have to comply with the administrative remedies to which the defendants refer. The hardship of requiring the plaintiffs to follow these challenged administrative procedures is twofold. First, as a practical matter, the burden and cost to the plaintiffs of applying to seventeen separate transferring agencies is obviously greater than if the

plaintiffs could apply directly to the defendants for relief. The defendants at the hearing in this matter in fact recognized the increased efficiencies to the plaintiffs if they could compel the defendants to act on their claims.

More fundamentally, however, to require the plaintiffs to comply with the administrative procedures they are challenging as in violation of their unclaimed property laws and the Tenth Amendment would impose on them the very hardship and injury that they are trying to prevent by the filing of this action.

Accordingly, this Court rules that the plaintiffs' complaint is ripe for review. The plaintiffs have established the fitness of the issue for review and have demonstrated that they would suffer hardship if judicial review were denied.

V. FAILURE TO STATE A CLAIM

For purposes of a motion to dismiss, the complaint is to be construed in the light most favorable to the plaintiffs and its allegations taken as true. *Scheuer v. Rhodes*, 416 U.S. 232, 236, 94 S.Ct. 1683, 1686, 40 L.Ed.2d 90 (1974); *Shear v. National Rifle Ass'n*, 606 F.2d 1251, 1253 (D.C.Cir.1979); *United States v. Kearns*, 595 F.2d 729, 731 (D.C.Cir.1978). As stated by the Supreme Court:

> In appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.

Conley v. Gibson, 355 U.S. 41, 45-46, 78 S.Ct. 99, 101-102, 2 L.Ed.2d 80 (1957). This Court's inquiry is directed to whether the allegations constitute a statement of a claim under FED.R.CIV.P. 8(a). *Investors Syndicate of*

America, Inc. v. City of Indian Rocks Beach, 434 F.2d 871, 879 (5th Cir.1970).

The defendants contend that the "[p]laintiffs have failed to allege any duty—statutory or otherwise—on the part of the Secretary to provide the information sought" and to disburse the monies. *Defendants' Motion for Judgment* at 48. Each of the plaintiff States has an unclaimed property statute which permits it to obtain custody and possession of the funds in the unclaimed monies accounts which are now held by the Secretary and to require the holder of monies to identify the owners. The Amended Complaint, on its face, states that the plaintiffs are seeking relief pursuant to these statutes. The right and capacity of the States to rely upon their unclaimed property laws in a cause of action with respect to property held by the federal government is well-established. *See Roth v. Delano*, 338 U.S. 226, 70 S.Ct. 22, 94 L.Ed. 13 (1949); *Anderson National Bank v. Luckett*, 321 U.S. 233, 64 S.Ct. 599, 88 L.Ed. 692 (1944); *United States v. Klein*, 303 U.S. 276, 58 S.Ct. 536, 82 L.Ed. 840 (1938); *United States v. Alabama*, 434 F.Supp. 64 (M.D. Ala. 1977).

The defendants' recapitulation of the federal statutory and administrative scheme to support their argument that the plaintiffs have failed to state a claim is again begging the question in this case. The federal statutory and administrative scheme relied upon by the defendants may constitute a defense to the cause of action under the Supremacy Clause or the doctrine of exhaustion but it is not relevant to whether the plaintiffs have stated a claim pursuant to their state unclaimed property laws.

This Court rules that the plaintiffs have stated a claim upon which relief can be granted.

VI. SUPREMACY CLAUSE

The defendants contend that to require them to comply with the plaintiffs' unclaimed property laws rather than the federal statutory and administrative scheme outlined in Part I of this opinion, *supra*, would violate the Supremacy Clause. The Supremacy Clause of the Constitution provides that "the Laws of the United States which shall be made in Pursuance" of the Constitution "shall be the supreme law of the land." Art. VI, cl. 2. *See City of New York v. Federal Communications Comm'n*, 486 U.S. 57, 108 S.Ct. 1637, 100 L.Ed.2d 48 (1988); *Free v. Bland*, 369 U.S. 663, 666, 82 S.Ct. 1089, 1092, 8 L.Ed.2d 180 (1962) ("[t]he relative importance to the State of its own law is not material when there is a conflict with a valid federal law, for the Framers of our Constitution provided that the federal law must prevail" and "any state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield").

The Court's inquiry is "directed toward whether there is a valid federal law, and if so, whether there is a conflict with State law." *Hancock v. Train*, 426 U.S. 167, 96 S.Ct. 2006, 48 L.Ed.2d 555 (1976). Federal law preempts state law

> when Congress, in enacting a federal statute, expresses a clear intent to preempt state law . . . , when there is outright or actual conflict between federal and state law . . . , where compliance with both federal and state law is in effect physically impossible . . . , where there is implicit in federal law a barrier to state regulation . . . , where Congress has legislated comprehensively, thus occupying an entire field of regulation and leaving no room for the States to supplement federal laws . . . , or where the state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress.

Louisiana Public Serv. Comm'n v. Federal Communications Comm'n, 476 U.S. 355, 368-69, 106 S.Ct. 1890, 1898, 90 L.Ed.2d 369 (1986) (citations omitted).

A. Valid Federal Law

There can be no argument that Congress is without authority to place unclaimed monies in the custody of the Secretary. "When the United States disburses its funds or pays its debts, it is exercising a constitutional function." *Clearfield Trust Co. v. United States*, 318 U.S. 363, 366, 63 S.Ct. 573, 574, 87 L.Ed. 838 (1943). It makes no difference "whether the United States have the use of this money as they do the ordinary revenues of the government or whether the money represents a trust fund created by Congress and earmarked for a specific purpose. In either case it is money in the Treasury of the United States as to which the United States has had and have the power to control and disposition." *Haskins Bros. & Co. v. Morgenthau*, 85 F.2d 677, 681 (D.C.Cir.1936). Thus, even for monies which come into "possession of the United States charged with a trust," such monies are "nevertheless public moneys . . . which the United States are charged with the duty of conserving." *Id.; see also Buchanan v. Alexander*, 45 U.S. (4 How.) 20, 20-21, 11 L.Ed. 857 (1846) (court rejected creditors' attempt to attach seamen's salaries, holding that even though the monies sought to be garnished are owed to the seamen, "[s]o long as money remains in the hands of a disbursing officer, it is as much money of the United States, as if it had not been drawn from the treasury"); *American Guaranty Corp. v. Burton*, 380 F.2d 789, 791 (1st Cir.1967); *Brockelman v. Brockelman*, 478 F.Supp. 141, 143 (D.Kan.1979).

The plaintiffs challenge the validity of the federal law on two grounds. First, they contend that the defendants have misinterpreted § 1322 to require that the plaintiffs apply to the individual agencies. The plaintiffs contend

that the defendants have the authority to disburse the monies without a voucher from the transferring agencies.

Section 1322(a) provides that subsequent claims to unclaimed monies from the transferring agencies will be paid from the unclaimed monies accounts established by the Secretary. However, as plaintiffs recognize, § 1322 does not specify the payment procedure. *Plaintiffs' Opposition* at 35 (this section does not "specif[y] the ultimate disposition of the money"). As the plaintiffs further recognize, "[n]othing in the legislative history or language of Section 1332(a) indicates that Congress intended the establishment of the Treasury trust fund receipt account to provide anything more than bookkeeping convenience and safekeeping for the monies deposited therein." *Plaintiffs' Opposition* at 59.

The principal rationale offered by the plaintiff States for proceeding directly against the Secretary is that under § 1322 he is "authorized to make disbursements from this account" and accordingly he does not need a certified voucher from the transferring agency. However, simply because the Secretary may be able to disburse the funds without certifying vouchers from the transferring agencies—an issue which this Court does not need to resolve—does not mean that he is precluded from establishing a scheme whereby he authorizes disbursements only after receiving certified vouchers from the agencies. This scheme is eminently reasonable where the transferring agencies are the ones with the records in the first instance by which to determine which monies they have held for over one year and accordingly which monies to transfer to the unclaimed monies accounts. This Court defers to the Secretary's interpretation of § 1322. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844, 104 S.Ct. 2778, 2782, 81 L.Ed.2d 694 (1984).

The plaintiffs' challenge of the validity of the statutory and administrative scheme under the Tenth Amendment

is meritless. This case does not involve the issue of whether §1322 preempts states' rights to escheat the monies and all the cases relied upon by the States for this proposition are thus not relevant. *See* footnote 13, *supra* (discussion of *United States v. Klein*, 303 U.S. 276, 58 S.Ct. 536). Rather, the States, relying on their unclaimed property laws, assert a right to obtain *custody* of the monies, hold the monies either in perpetuity or for a specified number of years for the original claimants, and pay any such claims from state-held accounts. *Plaintiffs Initial Response* pp. 3, 12.

B. Conflict Between State Laws and § 1322

In *State of Utah v. United States of America*, Civil No. NC 80-0079-J (May 29, 1981), the court rejected the State's suit to compel the Secretary of the Treasury to transfer custody of unclaimed tax refunds checks [that] were allegedly deposited in the predecessor account to § 1322. The court held, *inter alia*:

> Congress has established a statutory scheme for the disposition by the United States of unclaimed tax refund checks, thereby preempting the field. Title 31 U.S.C. § 725p provides that all "Unclaimed moneys of individuals whose whereabouts are unknown (Treasury)," including unclaimed federal tax refund checks, are to be covered into a trust fund receipt account in the Treasury to be designated "Unclaimed Moneys of Individuals Whose Whereabouts Are Unknown." Any state law in conflict with the federal statute must fall by virtue of the Supremacy Clause of the U.S. Constitution.

Id. at 3. The recodification of Title 31 in 1982 to enact § 1322 into positive law did not diminish the Secretary's custody of the monies.

The plaintiffs contend that *State of Utah* was wrongly decided because there is no evidence—under either § 1322

or its predecessor accounts—that Congress intended for the federal government to maintain custody of the unclaimed monies. However, the *statute itself* authorizes the Treasury to maintain custody of these monies. The plain language and meaning of the statute is the best source of legislative intent and the plaintiffs have found nothing in the legislative history that is plainly inconsistent with the statutory language.[17]

---

[17] That Congress intended for the Treasury to maintain custody of the funds is apparent in subsequent bills introduced in the 100th Congress which, had they passed, would have effected the same relief that the plaintiffs seek here pursuant to § 1322. *See* S.1612, 100th Cong., 1st Sess. (Aug. 5 (or 6) 1987); H.R. 4298, 100th Cong., 2d Sess. (March 30, 1988). As Senator Hatch, the sponsor of S.1612, noted, his bill, the Unclaimed Property Act of 1987, would require federal agencies to "turn over the [unclaimed] funds to the states rather than the U.S. Treasury." 133 Cong.Rec. S 11492 (Aug. 6, 1987).

Moreover, that Congress intended the Treasury to maintain custody of the monies is all the more apparent when other statutes are examined where Congress expressly authorized the States to obtain custody of unclaimed monies. The same Congress that recodified title 31 and expressly vested custody of certain unclaimed monies in the Secretary pursuant to § 1322 also enacted a provision effecting transfer to the States' custody of other unclaimed monies being held in the custody of the Comptroller of the Currency. The purpose of the Garn-St. Germaine Depository Institutions Act of 1982, P.L. No. 97-320, 12 U.S.C. § 216, et seq., was "to dispose of unclaimed property in the possession, custody or control of the Comptroller of the Currency," which the Comptroller of the Currency has "acquired from receivers of national banks that failed before and during the pre-WWII Depression." S.Rep. No. 97-536, 1982 U.S.Code Cong. & Adm. News 3054, 3082 (1982). The Act expressly provided that states with unclaimed property laws authorizing them to obtain custody or possession of the property could file a claim: "the term 'claimant' means any person or entity, including a state under applicable statutory law, asserting a demonstrable legal interest in the title to, *or custody and possession* of, unclaimed property." 12 U.S.C. § 216a(3) (emphasis added); *see also* 1982 U.S. Code Cong. & Adm.News 3083; 12 C.F.R. § 33.4(a), (f).

Two of the plaintiffs—Illinois and Utah—have acknowledged the need for legislation in order to transfer custody of the monies from

Therefore, since Congress has the authority to place custody of these monies with the Secretary and has done so without any provision requiring transfer to the States' custody upon request, the Supremacy Clause invalidates any state statutes which can be interpreted as providing for state custody of the monies in Accounts 20X6133 and 1060. Section 1322 clearly places the custodial rights to the monies with the Secretary and since both entities cannot have custody the Supremacy Clause requires that § 1322 take precedent. The states simply cannot claim a superior right to custody.

C. Supremacy Clause and State Regulation of Federal Agencies

The plaintiffs contend that the Secretary is a "holder" of unclaimed property pursuant to their respective unclaimed property laws and therefore he must comply with their reporting and disbursing requirements. *See* Plaintiffs Responses at 6, 9, 13-14, 24. Such contentions, however, are meritless where "it is well established that the doctrine of federal supremacy protects the legitimate activities of the United States Government from regulation by state authorities." *Township of Middleton v. N/E Regional Office, United States Postal Serv.*, 601 F.Supp. 125, 127 (D.N.J.1985); *see also Hancock v. Train*, 426 U.S. 167, 178, 96 S.Ct. 2006, 2012, 48 L.Ed.2d 555 (1976); *United States v. Town of Windsor, Connecticut*, 765 F.2d 16, 18 (2dCir.1985); *Don't Tear It Down, Inc. v. Pennsylvania Avenue Development Corp.*, 642 F.2d 527, 533-34 (D.C.Cir.1980).

State regulation of federal activities is appropriate "only when and to the extent there is 'a clear congres-

---

the Secretary to the respective States: "The National Association of Unclaimed Property Administrators (NAUPA) will be again submitting legislation that will empower Federal agencies to turn such unclaimed property to the state offices for return to the owners." *See* Letters to Bettsy Hettinger of FMS, (Exh. B).

sional mandate,' 'specific congressional action' that makes this authorization of state regulation 'clear and unambiguous.' " *Hancock v. Train*, 426 U.S. at 179, 96 S.Ct. at 2012 (state cannot require federal agencies to obtain permits); *see also Don't Tear It Down*, 642 F.2d at 535. This Court can find nothing in 31 U.S.C. § 1322—nor have plaintiffs pointed this Court to anything—which evidences a "clear congressional mandate" authorizing the States to impose the requirements of their unclaimed property laws on the Secretary. Therefore, any reliance on the States' own laws to compel the disbursement of the monies and the production of information must fail.[18]

---

[18] In addition to reporting and transfer of custody requirements, most of the plaintiffs' unclaimed property laws also authorize civil and/or criminal penalties for failure of a "holder" to comply. It is ludicrous to imply that Congress intended to subject the Secretary not just to state reporting and disbursing requirements but also to monetary penalties and/or jail for failure to comply. The plaintiffs contend that any assertion that the Secretary would be fined or jailed is speculative.

However, the issue is not whether the plaintiffs would exercise discretion in seeking fines and jail sentences but whether in fact their state law—which plaintiffs contend is binding upon the Secretary—authorizes such penalties. The plaintiffs do not dispute that their laws in fact provide for the imposition of fines and jail terms on "holders"—which the plaintiffs contend the Secretary is—of unclaimed property for failure to comply with their disbursing and reporting provisions. *See* Ala.Code §§ 35-12-31 through 35-12-33, 35-12-45; Ariz.Rev.Stat. §§ 44-317 through 44-319, 44-334; 12 Del. CodeAnn. §§ 1199 through 1201, 1207; Ill.Ann.Stat. Ch. 141, ¶¶ 111 through 113, 125; Kan.Stat.Ann. §§ 58-3912 through 58-3914, 58-3926; Minn.Stat. §§ 345.41 through 345.43, 345.55; Nev.Rev.Stat. §§ 120A.250, 120A.280, 120A.290, 120A.320, 120A.440; Ohio Rev.Code Ann. §§ 169.03, 169.05, 169.06, 169.99; 72 Pa.Cons.Stat.Ann. §§ 1301.11 through 1301.12, 1301.25; S.D. Codified Laws §§ 43-41A-18 through 43-41A-34, 43-41A-25; and Utah Code Ann. §§ 78-44-18 through 78-44-20, 78-44-36. The plaintiffs do not attempt to deny—consistent with their position that their state laws apply to the defendants—that the plaintiff States could in fact proceed against the defendants with such penalties.

VII. EXHAUSTION OF ADMINISTRATIVE REMEDIES

The defendants contend that the State plaintiffs have failed to exhaust their administrative remedies for the disbursement of unclaimed monies where they have failed to apply to the transferring agencies. The plaintiffs concede that they have not directly applied to the transferring agencies but have been contending throughout this litigation that they were not required to under their unclaimed property laws. However, in light of this Court's ruling that the federal statutory and administrative scheme under § 1322 takes precedence over the plaintiffs' unclaimed property laws, the plaintiffs must now exhaust their administrative remedies.

Although the plaintiffs claim that the defendants have failed to identify the specific procedures within each transferring agency by which the plaintiffs must proceed, the undisputed fact is that the defendants themselves are unaware of the agencies' individual procedures for perfecting claims and authorizing vouchers for claimants. Indeed, this is the very reason why the defendants are contending that the plaintiffs must apply to the transferring agencies where these agencies not only have the authority to proceed on the plaintiffs' claims but also possess the information to apprise the plaintiffs on how to proceed.

Accordingly, this Court rules that the plaintiffs have failed to exhaust their administrative remedies and they must contact the particular transferring agency, bureau or office and must comply with its requirements for perfecting a claim.

It hereby is

ORDERED that defendants' Motion for Judgment on the Pleadings or, in the Alternative, for Summary Judgment be, and the same hereby is, GRANTED.

APPENDIX C

ARTICLE VI, CLAUSE 2 OF THE UNITED STATES CONSTITUTION

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

APPENDIX D

Sec. 1322. Payments of unclaimed trust fund amounts and refund of amounts erroneously deposited

(a) On September 30 of each year, the Secretary of the Treasury shall transfer to the Treasury trust fund receipt account "Unclaimed Moneys of Individuals Whose Whereabouts are Unknown" that part of the balance of a trust fund account named in section 1321(a)(1)-(82) of this title or an analogous trust fund established under section 1321(b) of this title that has been in the fund for more than one year and represents money belonging to individuals whose whereabouts are unknown. Subsequent claims to the transferred funds shall be paid from the account "Unclaimed Moneys of Individuals Whose Whereabouts are Unknown".

(b) Except as provided in subsection (c) of this section, necessary amounts are appropriated to the Secretary of the Treasury to make payments from—

(1) the Treasury trust fund receipt account "Unclaimed Moneys of Individuals Whose Whereabouts are Unknown"; and

(2) the United States Government account "Refund of Moneys Erroneously Received and Covered" and other collections erroneously deposited that are not properly chargeable to another appropriation.

(c)(1) The Secretary of the Treasury shall hold in the Treasury trust fund receipt account "Unclaimed Moneys of Individuals Whose Whereabouts Are Unknown" the balance remaining after the final distribution of unclaimed Postal Savings System deposits under subsection (a) of the first section of the Act of August 13, 1971 (Public Law 92-117; 85 Stat. 337). The Secretary shall use the balance to pay claims for Postal Savings System deposits without regard to the State law or the law of other jurisdictions of deposit concerning the disposition of unclaimed or abandoned property.

(2) Necessary amounts may be appropriated without fiscal year limitation to the trust fund receipt account to pay claims for deposits when the balance in the account is not sufficient to pay the claims made within the time limitation set forth in paragraph (3) of this subsection.

(3) No claim for any Postal Savings System deposit may be brought more than one year from the date of the enactment of the Postal Savings System Statute of Limitations Act.

(4) The United States Postal Service shall assist the Secretary of the Treasury in providing public notice of the time limitation set forth in paragraph (3) of this subsection by posting notices thereof in all post offices as soon as practicable after the date of the enactment of the Postal Savings System Statute of Limitations Act.

(Pub. L. 97-258, Sept. 13, 1982, 96 Stat. 922; Pub. L. 98-359, Sec. 2, July 13, 1984, 98 Stat. 402.)

APPENDIX E

Sec. 1321. Trust funds

(a) The following are classified as trust funds:

(1) Philippine special fund (customs duties).

(2) Philippine special fund (internal revenue).

(3) Unclaimed condemnation awards, Department of the Treasury.

(4) Naval reservation, Olangapo civil fund.

(5) Armed Forces Retirement Home Trust Fund.

(6) Return to deported aliens of passage money collected from steamship companies.

(7) Vocational rehabilitation, special fund.

(8) Library of Congress gift fund.

(9) Library of Congress trust fund, investment account.

(10) Library of Congress trust fund, income from investment account.

(11) Library of Congress trust fund, permanent loan.

(12) Relief and rehabilitation, Longshore and Harbor Workers' Compensation Act.

(13) Cooperative work, Forest Service.

(14) Wages and effects of American seamen, Department of Commerce.

(15) Pension money, Saint Elizabeths Hospital.

(16) Personal funds of patients, Saint Elizabeths Hospital.

(17) National Park Service, donations.

(18) Purchase of lands, national parks, donations.

(19) Extension of winter-feed facilities of game animals of Yellowstone National Park, donations.

(20) Indian moneys, proceeds of labor, agencies, schools, and so forth.

(21) Funds of Federal prisoners.

(22) Commissary funds, Federal prisons.

(23) Pay of the Navy, deposit funds.

(24) Pay of Marine Corps, deposit funds.

(25) Pay of the Army, deposit fund.

(26) Preservation birthplace of Abraham Lincoln.

(27) Funds contributed for flood control, Mississippi River, its outlets and tributaries.

(28) Funds contributed for flood control, Sacramento River, California.

(29) Effects of deceased employees, Department of the Treasury.

(30) Money and effects of deceased patients, Public Health Service.

(31) Effects of deceased employees, Department of Commerce.

(32) Topographic survey of the United States, contributions.

(33) National Institutes of Health, gift fund.

(34) National Institutes of Health, conditional gift fund.

(35) Patients' deposits, United States Marine Hospital, Carville, Louisiana.

(36) Estates of deceased personnel, Department of the Army.

(37) Effects of deceased employees, Department of the Interior.

(38) Fredericksburg and Spotsylvania County Battlefields memorial fund.

(39) Petersburg National Military Park fund.

(40) Gorgas memorial laboratory quotas.

(41) Contributions to International Boundary Commission, United States and Mexico.

(42) Salvage proceeds, American vessels.

(43) Wages due American seamen.

(44) Federal Industrial Institution for Women, contributions for chapel.

(45) General post fund, National Homes, Department of Veterans Affairs.

(46) Repatriation of American seamen.

(47) Expenses, public survey work, general.

(48) Expenses, public survey work, Alaska.

(49) Funds contributed for improvement of roads, bridges, and trails, Alaska.

(50) Protective works and measures, Lake of the Woods and Rainy River, Minnesota.

(51) Washington redemption fund.

(52) Permit fund, District of Columbia.

(53) Unclaimed condemnation awards, National Capital Park and Planning Commission, District of Columbia.

(54) Unclaimed condemnation awards, Rock Creek and Potomac Parkway Commission, District of Columbia.

(55) Miscellaneous trust fund deposits, District of Columbia.

(56) Surplus fund, District of Columbia.

(57) Relief and rehabilitation, District of Columbia Workmen's Compensation Act.

(58) Inmates' fund, workhouse and reformatory, District of Columbia.

[(59) Repealed. Pub. L. 101-510, div. A, title XV, Sec. 1533(c)(1)(A)(ii), Nov. 5, 1990, 104 Stat. 1735.]

(60) Chamber Music Auditorium, Library of Congress.

(61) Bequest of Gertrude Hubbard.

(62) Puerto Rico special fund (Internal Revenue).

(63) Miscellaneous trust funds, Department of State.

(64) Funds contributed for improvement of (name of river or harbor).

(65) Funds advanced for improvement of (name of river or harbor).

(66) Funds contributed for Indian projects.

(67) Miscellaneous trust funds of Indian tribes.

(68) Ship's stores profits, Navy.

(69) Completing Surveys within Railroad Land Grants.

(70) Memorial to Women of World War, contributions.

(71) Funds contributed for Memorial to John Ericsson.

(72) American National Red Cross Building, contributions.

(73) Estate of decedents, Department of State, Trust Fund.

(74) Funds due Incompetent Beneficiaries, Department of Veterans Affairs.

(75) To promote the Education of the Blind (principal).

(76) Paving Government Road across Fort Sill Military Reservation, Okla.

(77) Bequest of William F. Edgar, Museum and Library, office of Surgeon General of the Army.

(78) Funds Contributed for Flood Control (name of river, harbor, or project).

(79) Matured obligations of the District of Columbia.

(80) To promote the education of the blind (interest).

[(81) Repealed. Pub. L. 101-510, div. A, title XV, Sec. 1533(c)(1)(A)(ii), Nov. 5, 1990, 104 Stat. 1735.]

(82) Post-Vietnam Era Veterans Education Account, Department of Veterans Affairs.

(83) United States Government life insurance fund, Department of Veterans Affairs.

(84) Estates of deceased soldiers, United States Army.

(85) Teachers Retirement Fund Deductions, District of Columbia.

(86) Teachers Retirement Fund, Government Reserves, District of Columbia.

(87) Expenses of Smithsonian Institution Trust Fund (principal).

(88) Civil Service Retirement and Disability Fund.

(89) Canal Zone Retirement and Disability Fund.

(90) Foreign Service Retirement and Disability Fund.

(b) Amounts (except amounts received by the Comptroller of the Currency and the Federal Deposit Insurance Corporation) that are analogous to the funds named in subsection (a) of this section and are received by the United States Government as trustee shall be deposited in an appropriate trust fund account in the Treasury. Amounts accruing to these funds (except to the trust fund "Armed Forces Retirement Home Trust Fund") are appropriated to be disbursed in compliance with the terms of the trust. Expenditures from the trust fund "Armed Forces Retirement Home Trust Fund" shall be made only under annual appropriations and only if the appropriations are specifically authorized by law.

(Pub. L. 97-258, Sept. 13, 1982, 96 Stat. 919; Pub. L. 98-426, Sec. 27(d)(2), Sept. 28, 1984, 98 Stat. 1654; Pub. L. 101-189, div. A, title III, Sec. 341(a), Nov. 29, 1989, 103 Stat. 1419; Pub. L. 101-510, div. A, title XV, Sec. 1533(c)(1), Nov. 5, 1990, 104 Stat. 1736; Pub. L. 102-54; Sec. 13(l)(1), June 13, 1991, 105 Stat. 277.)

APPENDIX F

CODE OF ALABAMA 1975

TITLE 35. PROPERTY.

CHAPTER 12. LOST OR UNCLAIMED PROPERTY.

ARTICLE 2. UNIFORM DISPOSITION OF UNCLAIMED PROPERTY ACT.

§ 35-12-21. Definitions.

As used in this article, unless the context otherwise requires, the following terms shall have the meanings respectively ascribed to them by this section:

* * * *

(4) Holder. Any person in possession of property subject to this article belonging to another, or who is trustee in case of a trust or is indebted to another on an obligation subject to this article.

* * * *

(7) Person. Any individual, business association, government or political subdivision, public corporation, public authority, public official, estate, trust, two or more persons having a joint or common interest or any other legal or commercial entity.

* * * *

(Acts 1971, No. 63, p. 101, § 1.)

§ 35-12-31. Report of abandoned property.

(a) Every person holding funds or other property, tangible or intangible, presumed abandoned under this article shall report to the commissioner of revenue with respect to the property as hereinafter provided.

(b) The report shall be verified and shall include:

(1) Except with respect to traveler's checks and money orders, the name, if known, and last known

address, if any, of each person appearing from the records of the holder to be the owner of any property of the value of $10.00 or more presumed abandoned under this section;

(2) In case of unclaimed funds of life insurance corporations, the full name of the insured or annuitant and his last known address according to the life insurance corporation's records;

(3) The nature and identifying number, if any, or description of the property and the amount appearing from the records to be due;

(4) The date when the property became payable, demandable or returnable and the date of the last transaction with the owner with respect to the property; and

(5) Other information which the commissioner of revenue prescribes by rule as necessary for the administration of this article.

(c) If the person holding property presumed abandoned is successor to other persons who previously held the property for the owner or if the holder has changed his name while holding the property, he shall file with his report all prior known names and addresses of each holder of the property.

(d) Reports required under this article shall be filed before November 1 of each year as of June 30 next preceding, but the reports filed by insurance corporations shall be filed before May 1 of each year as of December 31 next preceding. The commissioner of revenue may postpone the reporting date upon written request by any person required to file a report.

(e) If the holder of property presumed abandoned under this article knows the whereabouts of the owner and if the owner's claim has not been barred by the statute of limitations, the holder shall, before filing the annual

report, communicate with the owner and take necessary steps to prevent abandonment from being presumed. The holder shall exercise due diligence to ascertain the whereabouts of the owner.

(f) Verification, if made by a partnership, shall be executed by a partner; if made by an unincorporated association or private corporation, by an officer; and if made by a public corporation, by its chief fiscal officer.

(Acts 1971, No. 63, p. 101, § 11; Acts 1973, No. 1084, p. 1844, § 2.)

§ 35-12-32. Notices to be published and mailed by commissioner of revenue.

(a) Within 120 days from the filing of the reports required by section 35-12-31, the commissioner of revenue shall cause notice to be published at least once each week for two successive weeks in an English language newspaper of general circulation in the county in this state in which is located the last known address of any person to be named in the notice. If no address is listed or if the address is outside this state, the notice shall be published in the county in which the holder of the abandoned property has his principal place of business within this state.

(b) The published notice shall be entitled "notice of names of persons appearing to be owners of abandoned property," and shall contain:

(1) The names in alphabetical order and last known addresses, if any, of persons listed in the report and entitled to notice within the county as hereinbefore specified.

(2) A statement that information concerning the amount or description of the property and the name and address of the holder may be obtained by any person possessing an interest in the property by addressing an inquiry to the commissioner of revenue.

(3) A statement that if proof of claim is not presented by the owner to the holder and if the owner's right to receive the property is not established to the holder's satisfaction within 65 days from the date of the second published notice, the abandoned property will be placed not later than 85 days after such publication date in the custody of the commissioner of revenue to whom all further claims must thereafter be directed.

(c) The commissioner of revenue is not required to publish in such notice any item of less than $50.00 unless he deems such publication to be in the public interest.

(d) Within 120 days from the receipt of the reports required by section 35-12-31, the commissioner of revenue shall mail a notice to each person having an address listed therein who appears to be entitled to property of the value of $50.00 or more presumed abandoned under this article.

(e) The mailed notice shall contain:

(1) A statement that, according to a report filed with the commissioner of revenue, property is being held to which the addressee appears entitled.

(2) The name and address of the person holding the property and any necessary information regarding changes of name and address of the holder.

(3) A statement that, if satisfactory proof of claim is not presented by the owner to the holder by the date specified in the published notice, the property will be placed in the custody of the commissioner of revenue to whom all further claims must be directed.

(f) This section is not applicable to sums payable on traveler's checks or money orders presumed abandoned under section 35-12-22.

(Acts 1971, No. 63, p. 101, § 12; Acts 1973, No. 1084, p. 84, § 3.)

§ 35-12-33. Payment or delivery of abandoned property —Generally.

Every person who has filed a report under section 35-12-31, within 20 days after the time specified in section 35-12-32 for claiming the property from the holder or, in the case of sums payable on traveler's checks or money orders presumed abandoned under section 35-12-22, within 20 days after the filing of the report, shall pay or deliver to the commissioner of revenue all abandoned property specified in the report; except, that if the owner establishes his right to receive the abandoned property to the satisfaction of the holder within the time specified in section 35-12-32, or if it appears that for some other reason the presumption of abandonment is erroneous, the holder need not pay or deliver the property, which will no longer be presumed abandoned, to the commissioner of revenue, but in lieu thereof shall file a verified written explanation of the proof of claim or of the error in the presumption of abandonment.

(Acts 1971, No. 63, p. 101, § 13; Acts 1973, No. 1084, p. 1844, § 4.)

§ 35-12-34. Same—Relief from liability; rights become obligations of state; reimbursement.

Upon the payment or delivery of abandoned property to the commissioner of revenue, the state shall assume custody and shall be responsible for the safekeeping thereof. Any person who pays or delivers abandoned property to the commissioner of revenue under this article is relieved of all liability to the extent of the value of the property so paid or delivered for any claim which then exists or which thereafter may arise or be made in respect to the property. The payment or delivery of abandoned property to the commissioner of revenue shall operate as a full, absolute and unconditional release and discharge of the person making the payment or delivery from any and all claims or demands of or liability to

any person entitled thereto, or to any other claimant or state, and such payment or delivery may be pleaded as an absolute bar to any action brought against the person making the payment or delivery by any other person entitled thereto, or by any other claimant or state. The person making such payment or delivery shall immediately and thereafter be relieved of and held harmless by the state of Alabama from any and all liabilities for any claim or claims which exist at such time with reference to such abandoned property or which may thereafter be made or may come into existence on account of or in respect to any such abandoned property. Any right to such abandoned property which any other person entitled thereto or any claimant or state may have against the person making such payment or delivery to the commissioner of revenue shall thereby become the obligation of the state of Alabama. Any holder who has paid moneys to the commissioner of revenue pursuant to this article may make payment to any person appearing to such holder to be entitled thereto; and, upon proof of such payment and proof that the payee was entitled thereto, the commissioner of revenue shall forthwith reimburse the holder for the payment.

(Acts 1971, No. 63, p. 101, § 14.)

APPENDIX G

NEW HAMPSHIRE STATUTES ANNOTATED

TITLE XLVI. LOST PROPERTY; STRAYS

CHAPTER 471-C. CUSTODY AND ESCHEAT OF UNCLAIMED AND ABANDONED PROPERTY

471-C:1. Definitions

As used in this chapter, unless the context otherwise requires:

* * * *

IX. "Holder" means a person, wherever organized or domiciled, who is:

(a) In possession of property belonging to another;

(b) A trustee; or

(c) Indebted to another on an obligation.

* * * *

XIV. "Person" means an individual, business association, state or other government, governmental subdivision or agency, public authority, estate, trust, 2 or more persons having a joint or common interest, or any other legal or commercial entity.

* * * *

471-C:19. Report of Abandoned Property

I. A person holding property, tangible or intangible, presumed abandoned and subject to custody as unclaimed property under this chapter shall report to the administrator concerning the property as provided in this section.

II. The report shall be notarized and shall include:

(a) Except with respect to travelers checks and money orders, the name, if known, and last known address, if any, of each person appearing from the

records of the holder to be the owner of property of the value of $25 or more presumed abandoned under this chapter;

(b) In the case of the unclaimed funds of $25 or more held or owing under any life or endowment insurance policy or annuity contract, the full name and last known address of the insured or annuitant and of the beneficiary according to the records of the insurance company holding or owing the funds;

(c) In the case of the contents of a safe deposit box or other safekeeping repository or of other tangible property, a description of the property and the place where it is held and may be inspected by the administrator and any amounts owing to the holder;

(d) The nature and identifying number, if any, or description of the property and the amount appearing from the records to be due, but items of value under $25 each may be reported in the aggregate;

(e) The date the property become payable, demandable, or returnable, and the date of the last transaction with the apparent owner with respect to the property; and

(f) Other information the administrator prescribes by rules adopted, pursuant to RSA 541-A, relative to the administration of this chapter.

III. If the person holding property presumed abandoned and subject to custody as unclaimed property is a successor to other persons who previously held the property for the apparent owner or the holder has changed his name while holding the property, he shall file with his report all known names and addresses of each previous holder of the property.

IV. The report shall be filed before November 1 of each year for property presumed to be abandoned as of June 30 of that year, but the report of any insurance company

shall be filed before May 1 of each year for funds owing under insurance policies presumed to be abandoned as of December 31 of the preceding year. On written request by any person required to file a report, the administrator may postpone the reporting date.

V. Not more than 120 days before filing the report required by this section, the holder in possession of property abandoned and subject to custody as unclaimed property under this chapter shall send written notice to the apparent owner at his last known address informing him that the holder is in possession of property subject to this chapter if:

(a) The holder has in its records an address for the apparent owner which the holder's records do not disclose to be inaccurate;

(b) The claim of the apparent owner is not barred by the statute of limitations; and

(c) The property has a value of $25 or more.

471-C:20. Notice and Publication of Lists of Abandoned Property

I. The administrator shall cause a notice to be published not later than March 1, or in the case of property reported by insurance companies September 1, of the year immediately following the report required by RSA 471-C:19 at least once a week for 2 consecutive weeks in a newspaper of general circulation in the county of this state in which is located the last known address of any person to be named in the notice. If no address is listed or the address is outside this state, the notice must be published in the county in which the holder of the property has its principal place of business within this state.

II. The published notice shall be entitled "Notice of Names of Persons Appearing to be Owners of Abandoned Property" and shall contain:

(a) The names in alphabetical order and last known address, if any, of persons listed in the report and entitled to notice within the county as specified in paragraph I.

(b) A statement that information concerning the property and the name and last known address of the holder may be obtained by any person possessing an interest in the property by addressing an inquiry to the administrator.

III. The administrator is not required to publish in the notice any items of less than $25 unless the administrator considers their publication to be in the public interest.

IV. Not later than March 1, or in the case of property reported by insurance companies, not later than September 1, of the year immediately following the report required by RSA 471-C:19, the administrator shall mail a notice to each person whose last known address is listed in the report and who appears to be entitled to property of the value of $25 or more presumed abandoned under this chapter and any beneficiary of an insurance policy or annuity contract for whom the administrator has a last known address.

V. The mailed notice must contain:

(a) A statement that, according to a report filed with the administrator, property is being held to which the addressee appears entitled;

(b) The name and last known address of the person holding the property and any necessary information regarding the changes of name and last known address of the holder; and

(c) A statement that, if satisfactory proof of claim is not presented by the owner to the holder by the date specified in the published notice, the property will be placed in the custody of the administra-

tor and all further claims must be directed to the administrator.

VI. This section is not applicable to sums payable on travelers checks, money orders, and other written instruments presumed abandoned under RSA 471-C:4.

471-C:21. Payment or Delivery of Abandoned Property

I. A person who is required to file a report under RSA 471-C:19 shall pay or deliver to the administrator all abandoned property to be reported at the time of filing the report.

II, III. [Repealed 1990, 105:16, III, eff. April 13, 1990.]

IV. The holder of an interest under RSA 471-C:10 shall deliver a duplicate certificate or other evidence of ownership if the holder does not issue certificates of ownership to the administrator. Upon delivery of a duplicate certificate to the administrator, the holder and any transfer agent, registrar, or other person acting for or on behalf of a holder in executing or delivering the duplicate certificate is relieved of all liability of every kind in accordance with the provisions of RSA 471-C:22 to every person, including any person acquiring the original certificate or the duplicate of the certificate issued to the administrator, for any losses or damages resulting to any person by the issuance and delivery to the administrator of the duplicate certificate.

471-C:22. Custody by State; Holder Relieved from Liability; Reimbursement of Holder Paying Claims; Reclaiming for Owner; Defense of Holder; Payment of Safe Deposit Box or Repository Charges

I. Upon the payment or delivery of property to the administrator, the state assumes custody and responsibility for the safekeeping of the property. A person who

pays or delivers property to the administrator in good faith is relieved of all liability to the extent of the value of the property paid or delivered for any claim then existing or which thereafter may arise or be made in respect to the property.

II. A holder who has paid money to the administrator pursuant to this chapter may make payment to any person appearing to the holder to be entitled to payment and, upon filing proof of payment and proof that the payee was entitled thereto, the administrator shall promptly reimburse the holder for the payment without imposing any fee or other charge. If reimbursement is sought for a payment made on a negotiable instrument, including a travelers check or money order, the holder shall be reimbursed under this paragraph upon filing proof that the instrument was duly presented and that payment was made to a person who appeared to the holder to be entitled to payment. The holder shall be reimbursed for payment made under this paragraph even if the payment was made to a person whose claim was barred under RSA 471-C:33, I.

III. A holder who has delivered property, including a certificate of any interest in a business association, other than money to the administrator pursuant to this chapter may reclaim the property if still in the possession of the administrator, without paying any fee or other charge, upon filing proof that the owner has claimed the property from the holder.

IV. The administrator may accept the holder's affidavit as sufficient proof of the facts that entitled the holder to recover money and property under this section.

V. If the holder pays or delivers property to the administrator in good faith and thereafter another person claims the property from the holder or another state claims the money or property under its laws relating to escheat or abandoned or unclaimed property, the administrator, upon written notice of the claim, shall defend the

holder against the claim and indemnify the holder against any liability on the claim.

VI. For the purposes of this section, "good faith" means that:

(a) Payment or delivery was made in a reasonable attempt to comply with this chapter;

(b) The person delivering the property was not a fiduciary then in breach of trust in respect to the property and had a reasonable basis for believing, based on the facts then known to him, that the property was abandoned for the purposes of this chapter; and

(c) There is no showing that the records pursuant to which the delivery was made did not meet reasonable commercial standards of practice in the industry.

VII. Property removed from a safe deposit or other safekeeping repository is received by the administrator subject to the holder's right under this paragraph to be reimbursed for the actual cost of the opening and to any valid lien or contract providing for the holder to be reimbursed for unpaid rent or storage charges. The administrator shall reimburse or pay the holder out of the proceeds remaining after deducting the administrator's selling cost.